Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-141

HARVEY BINKLEY,

Petitioner,

vs.

VERN HENDRICKSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No._____

HARVEY BINKLEY, Petitioner,

vs.

VERN HENDRICKSON, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF INDIANA

Petitioner respectfully prays that a writ of certiorari issue to review the final decree of the Supreme Court of the State of Indiana entered herein on April 28, 1975, denying transfer and permitting the decision of the Court of Appeals of Indiana to stand, both of said decisions reversing the judgment

of the trial court, the Circuit Court of Harrison County, State of Indiana, entered on June 30, 1973, leaving custody of the minor child, Douglas Hendrickson, in this Petitioner, the maternal grandfather of said child; said decision of the Court of Appeals of Indiana, entered on September 3, 1974, having included instructions to the trial court to enter judgment awarding the custody of said child to the Respondent herein, Vern Hendrickson, father of said child.

OPINIONS BELOW

The judgment of the trial court was not accompanied by an opinion. Upon the general finding, in an action for writ of habeas corpus brought by the Respondent herein against the Petitioner herein, that court held that in the best interest and welfare of the child Douglas Hendrickson, his custody should be awarded to his maternal grandparents, that the law is with the "defendant", and judgment was so entered for this Petitioner and against

the Respondent herein. The decree and opinion of the Court of Appeals of Indiana, reversing the judgment of the trial court is reported in 316 N.E. 2d 376, and is set forth hereinaftrr in Appendix A of this Petition, pp. A-1 to A-6. The decree and decision of the Supreme Court of Indiana, denying transfer, entered April 28, 1975, was as follows:

"ORDER DENYING TRANSFER

"Appellee's 'Petition to Transfer to Supreme Court,' as filed on October 26, 1974 1974 and Appellee's 'Amended Petition to Transfer,' as filed November 12, 1974, are each DENIED this 28th day of April, 1975.

/s/ Richard M. Givan
Chief Justice of Indiana

All Justices concur."

No petition for rehearing is allowed under the rules of the Supreme Court of Indiana from an order on petition to transfer, but upon this Petitioner's Verified Petition For Stay Of Enforcement Of Judgment, the Supreme Court of Indiana thereafter entered the following order:

"ORDER DENYING STAY

"The 'Petition to Transfer to the Supreme Court' having been denied unanimously by this Court as of April 28, 1975, the litigation between the parties was thereby terminated in this Court, pursuant to A.P. Rule 11 (B) (4);

"Therefore the 'Verified Petition for Stay of Enforcement of Judgment' is now DENIED, without prejudice to the right of the Appellee to petition the Supreme Court of the United States for Stay of Judgment pending the filing with and final determination of Petition for Writ of Certiorari by that Court.

"DONE at Indianapolis, Indiana, this 23rd day of June, 1975.

/s/ Richard M. Givan
RICHARD M. GIVAN, CHIEF
JUSTICE
"Hunter, J. Dissents."

JURISDICTION

The decree of the Supreme Court of Indiana denying transfer as against the Petitioner herein, was dated and entered on April 28, 1975. No petition for rehearing of such decree is allowed under the Indiana Rules of Appellate Procedure, Rule 11, as amended, and none was filed. No extension of time within which to petition for certiorari has been requested. The statutory provision believed

to confer jurisdiction on this Court to review the decree in question by writ of certiorari is 28 U.S.C. § 1257 and the Fourteenth Amendment to the Constitution of the United States.

The relevant portion of 28 U.S.C. § 1257 reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court as follows:
>
> ***
>
> "(3) By writ of certiorari...where any title, right, privilege or immunity is specially set up or claimed under the Constitution...of the United States."

QUESTIONS PRESENTED

1. Did the Supreme Court of Indiana deny and deprive Petitioner and his small grandchild equal protection of laws as guaranteed by the provisions of the Fourteenth Amendment to the United States Constitution, by denying transfer and permitting the decision of the Court of Appeals of Indiana to stand, holding that this child is not protected and entitled to the benefit of the rule of law that the best interest of the child, as determined in the discretion of the trial judge,

controls as to custody and change of custody of the minor child.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14 to the United States Constitution, in part as follows:

> "...nor shall any state... deny to any person within its jurisdiction the equal protection of the laws."

RULE PROVISIONS INVOLVED

Appellate Rule 11 of the Indiana Rules of Appellate Procedure, of the Supreme Court of Indiana, in part as follows:

> "(B) (8) No petition for rehearing will be permitted filed upon the denial or granting of a petition to transfer..."

STATEMENT OF THE CASE

Petitioner was the respondent in the trial court, defending against a petition for writ of habeas corpus, seeking custody from Petitioner of his grandson, Douglas Scott Hendrickson, age (10) (now 12). The action was filed by the father of the boy, Respondent herein, and judgment was entered against him, in favor of this Petitioner herein, upon

a finding that it was in the best interest and welfare of the child that his custody be in this Petitioner, his maternal grandparent. The petition for the writ, labeled "WRIT", asserted that the child was wrongfully held and illegally restrained by this Petitioner, without cause or right, and asked that the child be ordered delivered to the Respondent herein, Vern Hendrickson, petitioner in the said trial court.

Prior to that time, the said trial court had obtained jurisdiction upon the action of the said Verr Hendrickson for divorce against Betty Ann Henrickson, daughter of this Petitioner, the separation of the father and son having occurred about one (1) year before the granting of the divorce, when the father had left his wife and said son. It was at that time, in 1966, that the wife and son moved to the home of this Petitioner, his grandfather, where he has remained for nine (9) years in the home of this Petitioner.

At the time of trial, the boy had lived

with this Petitioner six (6) years. Upon the granting of the divorce to the boy's mother, upon her cross complaint, custody of the boy was awarded to her. (March 24, 1967) After the death of the mother, daughter of this Petitioner, the father filed a Petition To Establish Custody, and on June 29, 1973, the same trial Court denied that petition which asked for custody of said minor child, and entered judgment that "the custody and care of said child, Douglas Hendrickson, remain and continue in his maternal grandparents, Mr. and Mrs. Harvey Binkley." In that proceeding, although there was a motion to correct errors filed by the father, respondent herein, there has been no ruling, no appeal, and said judgment remains outstanding. The Respondent did however appeal from the similar judgment against him in his action for writ of habeas corpus, and it was that judgment, against him and for this Petitioner, which was reversed by the Court of Appeals of Indiana herein, (Appendix A of this Petition), in which said Court held the welfare and best interest of this child is

not paramount and controlling as against the presumption favoring his father, Respondent herein, unless the trial court has first determined from clear and cogent evidence that there is either unfitness of the father, long acquiescence, or voluntary relinquishment. The Court of Appeals of Indiana further held the Respondent herein is entitled to the custody of the child, as a matter of law and without the exercise of discretion on the part of the trial judge--that the trial judge cannot determine that it is in the best interest of the child to be in the custody of a third party without such determination of unfitness of the parent, long acquiescence, or voluntary relinquishment--and said Court of Appeals held that the evidence does not disclose any such unfitness, long acquiescence or voluntary relinquishment of and by the father.

The decision of the Court of Appeals was not that specific findings be made, nor that a new trial be held, but that the father was entitled to custody as a matter of law.

Upon the amended petition to transfer,

denied by the Supreme Court of Indiana, it was contended by this Petitioner that:

1. The decision of the Court of Appeals of Indiana contravenes the ruling precedent of the Supreme Court of Indiana,

Mesmer v. Egland, (1926), 197 Ind. 700, 702, 151 N.E. 826; and

Jones v. Darnell, (1885) 103 Ind. 569, 2 N.E. 229

in which the Supreme Court of Indiana held that as to the custody of a child, the single question is presented: What is for the best interest of the child?

2. The decision of the Court of Appeals of Indiana contravenes the ruling precedent of the Supreme Court of Indiana,

Gilchrist v. Gilchrist, (1947), 225 Ind. 367, 75 N.E. 2d 417, 419

in which the Supreme Court of Indiana held that the right of the parent is not absolute, and must yield to the welfare of the child -- that the disposition of children is not controlled by hard and fast fules of law, but by the exercise of the sound discretion of the court confronted with the problem.

3. The decision of the Court of Appeals of Indiana contravenes the ruling precedent of the Supreme Court of Indiana,

Marshall v. Reeves, (1974), In the Supreme Court of Indiana, 311 N.E. 2d 807

in which the Supreme Court of Indiana held that a trial court's decision as to modification of custody rights will be affirmed unless a clear abuse of discretion is demonstrated by the record, and further, that the abuse of discretion rule requires the Court on appeal only to determine if the record discloses evidence or reasonable inferences therefrom which would serve as a rational basis for the finding of the trial court.

As hereinabove noted, the Supreme Court of Indiana denied transfer.

ARGUMENT

THE SUPREME COURT OF INDIANA DENIED AND DEPRIVED PETITIONER AND HIS SMALL GRANDCHILD EQUAL PROTECTION OF LAWS AS GUARANTEED BY THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY PERMITTING THE DECISION OF THE COURT OF APPEALS OF INDIANA TO STAND, HOLDING THAT SAID CHILD IS NOT PROTECTED AND AND ENTITLED TO THE BENEFIT OF THE RULE OF LAW THAT THE BEST INTEREST OF THE CHILD, AS DETERMINED IN THE DISCRETION OF THE

AS DETERMINED IN THE DISCRETION OF THE TRIAL JUDGE, CONTROLS AS TO CUSTODY AND CHANGE OF CUSTODY OF THE MINOR CHILD.

At the outset it should be noted, as pointed out to the Supreme Court of Indiana in the Amended Memorandum Brief In Support Of Amended Petition To Transfer, the Court of Appeals of Indiana totally ignored the statute which had been amended in 1965, providing that:

> Acts 1873, c. 43, as amended last by Acts 1965, c. 57, s. 1; as found in Burns, 1968 Repl., Sec. 3-1219
>
> IC 31-1-12-15
>
> "***Provided, That the jurisdiction over the child or children shall remain in the court at all times during the child's or children's minority and shall not be lost because of the death of either parent."

The Court of Appeals of Indiana held that the welfare and best interest of this child is not paramount and controlling as against the presumption favoring the father herein, even though the law of the State of Indiana, as held and determined by the Supreme Court of Indiana, was to the contrary. In the case of Mesmer v. Egland, (1926), 197 Ind. 700, 702, 151 N.E. 826, and in the case of Jones v. Darnell, (1885), 103 Ind. 569, 2 N.E. 229, the

Supreme Court of Indiana held:

Mesmer:

> "...the infant in this case was brought into court in obedience to a writ of habeas corpus. She was therefore in the custody of the court, subject to its disposition, uncontrolled by the averments of the return.
> ***
> "That the finding of the court (awarding custody to the great-grandmother against whom the action was filed, appellee on appeal) is not sustained by the evidence and is contrary to law are the causes assigned for a new trial. Generally speaking, proceedings as here, involving the custody of a child, present the single question: What is the best interests of the child? This case, as disclosed by the evidence, is no exception to the general rule. We learn from the evidence that the subject of this controvwrsy has resided with her great-grandmother (appellee) since she was five months old, except for short intervals when she visited her mother. She goes to school and attends Sunday School, and there is evidence to the effect that she has a good home with her great-grandparents, is well treated, and desires to remain with them. It appears that the mother (appellant) enjoys a splendid reputation, resides in Louisville, Ky., with her sister and brother-in-law, who bear a good moral reputation, and who have two children, 4 and 7 years old at the time of the trial, April 18, 1923. Appellant expects to take the child with her to a six-room rented home of her brother-in-law, who receives a salary of $75 a week. Appellant's only income is $14.50 to $15. a week as an employe of the Axton-Fisher Tobacco Company, where she works during the day.
>
> "We will not take the space to further recite the evidence given in the cause, as we deem it sufficient to say we would not

be warranted in holding that the finding of the trial court was not supported by substantial evidence, and therefore on that account it was not contrary to law."

Jones:

"The case at bar is very similar in its facts to that of Sturtevant v. State, 15 Neb. 459; S.C. 19 N.W. Rep. 617. In that case, as in this, the controversey was for the custody and possession of a motherless child, of but a few months' age, between the father and the maternal grandparents of such child. The statute of Nebraska, in relation to the custody of the person of the infant child, is almost identical with the statutory provision of this state, above quoted; and it was claimed in the case cited as in this case, that the statute settled the question in favor of the absolute right right of the father to the custody of the person of his infant child, as against its maternal grandparents. It was held by the supreme court of Nebraska in the case cited, notwithstanding their statute, that, if it appeared to be more for the benefit of the infant to remain with its grandparents than to be put under the care of its father, the court should refuse to direct the infant to be delivered to him; and that, in such a controversy for the custody of the child, the order of the court should be made with a single reference to the best interests of such child."

"In Schouler, Dom. Rel. Sec. 248, in declaring the American rule upon the question we are now considering, it is said: 'In this country, the doctrine is universal that the courts of justice may, in their sound discretion, and when the morals or safety or interests of the children strongly require it, withdraw their custody from the father and confer it upon the mother, or take the children from both parents, and place the

care and custody of them elsewhere. *** The cardinal principle relative to such matters is to regard the benefit of the infant; to make the welfare of the children paramount to the claims of either parent. *** The primary object of the American decisions is to secure the welfare of the child, and not the special claims of one or the other parent.'
***

"In the case in hand, after carefully examining and considering all the evidence appearing in the record, we have reached the conclusion that the best interests of appellee's child imperatively require that it should be suffered to remain, during the tender years of infancy, at least, in the custody and care of its grandparents.***"

The Court of Appeals in this case, however, held that the welfare and best interest of the child is not paramount and controlling as against the presumption favoring the natural parent.

Further, in contradiction and contravention of the law of the State of Indiana as held by the Supreme Court of Indiana in Gilchrist v. Gilchrist, (1947), 225 Ind. 367, 75 N.E. 2d 417, 419, the Court of Appeals of Indiana held "as a matter of law" that the father is entitled to the custody of the child, since it, the Court of Appeals, determined that the evidence does not disclose any unfitness, long acquiescence or voluntary relinquishment. In Gilchrist the father had been awarded custody, had re-

married, and then died. There is no indication that any adoption proceedings had been attempted, and there is no indication of any blood relationship between the child, age 10 years at the time, and the surviving wife of his father. There was no evidence that the mother was unfit, and she made the trip from her home in West Lafayette to Gary to see her son seven or eight times a year. The father did not bring the boy to her for visitation. During the three years after the divorce when the mother lived in Gary she visited her son frequently. The trial Court awarded the child to his natural mother, and although the judgment was affirmed, the Supreme Court of Indiana held as follows: 75 N.E. 2d at p. 419

> "There is no claim on either side that the stepmother, the grandmother (living with the stepmother) or the natural mother were not fit persons to have the custody of the boy. ***
>
> "At common law parents had a natural right to the cutody of their children, *** and we have statutes declaratory of the common law in this respect. Sections 8-109, 8-110, Burns' 1933.
>
> "Also under the decisions and opinions of our courts ordinarily a parent who is of good character and reasonably able to provide for his or her child is entitled to its custody as against others. ***The rights of

> parents, however, are not absolute. They must yield to the welfare of the child. Its welfare and best interest are the paramount and controlling considerations in all disputes over the custody of a child. The disposition of children is not controlled by hard and fast rules of law but by the exercise of the sound judicial discretion of the court confronted with the problem. Review by an appellate court of such disposition is limited to the question of abuse of judicial discretion."

It is obvious in this case that the child and his grandfather were singled out by the Court Of Appeals Of Indiana and the Supreme Court of Indiana (in denying transfer and allowing the decision of the Court Of Appeals to stand) for special treatment. There simply was no equal protection afforded them. The Court Of Appeals did not chose to apply the law of the State of Indiana in regard to the welfare and best interests of the child, and even went futher and held that this Petitioner lost custody and the custody of the child goes over to the father "as a matter of law", holding that the trial Court <u>cannot</u> determine that it is in the best interest of the child to remain in the custody of his grandfather, as against a <u>presumption</u> favoring his father, unless the trial court has first determined from

clear and cogent evidence that there is either unfitnrss of the father, long acquiescence, or voluntary relinquishment -- thus ruling out completely a consideration by the said Court Of Appeals of the question of abuse of discretion.

In denying this Petitioner and said child equal protection of the law of the State of Indiana it is significant to note that the Court Of Appeals was well aware, and noted in its opinion, the facts which the established law of Indiana recognizes as calling upon the discretion of the trial court in making the determination as to what is in the best interest of the child.

A. That the separation of the father and son occurred about one (1) year before the granting of the divorce, and occurred because the father left his wife and son.

B. That it was at that time, before the divorce, in 1966 when the father left the boy, that he and his mother moved in with his grandparents--this Petitioner and his wife.

C. That at the time of the hearing, 1973, the mother was deceased, and the boy, 10 years old, was still living with his maternal grandparents.

D. The boy did well in school, was happy on the farm and wanted to be a farmer. He participated in 4H activities, in scouting, and attends church regularly. His home life was happy.

Contrary to the decision of the trial Judge who heard and saw the witnesses, the Court of Appeals noted that the father now has a nice home and plenty of income, and that the law must take the boy out of the home he has known for eight (8) years and put him in a new environment with the father who left him and his mother eight years ago -- because of the right of the father -- that the trial Judge cannot weigh the best interest of the boy against the right of the father, as a matter of law.

Thus singled out this child and his grandfather are not protected by the applicable law in the State of Indiana; and the action of the Court Of Appeals and of the Supreme Court of

Indiana has denied them equal protection of the laws.

The inhibitions of the Fourteenth Amendment include the judicial branch of the State of Indiana, and the action of the Court Of Appeals Of Indiana and the Supreme Court of Indiana is state action within the meaning of the equal protection clause.

Barrows v. Jackson, 346 U.S. 249, 97 L ed 1586, 73 S.Ct. 19 (1953)

Shelley v. Kraemer, 334 U.S. 1, 92 L ed 1161, 68 S. Ct. 836, 3 A.L.R. 2d 441

CONCLUSION

For the reasons set forth above, the Petitioner respectfully prays that his petition for writ of certiorari be granted; that the decision of the Supreme Court of Indiana and the Court of Appeals of Indiana be reversed and remanded with instructions to apply the established law of the State of Indiana concerning custody of minor children in the appellate review of the decision of the Harrison Circuit Court in this cause.

Respectfully submitted,

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APPENDIX A

IN THE
COURT OF APPEALS OF INDIANA
****
No. 1-1173 A 199

VERN HENDRICKSON, Plaintiff-Appellant,) Appeal from the Harrison Circuit Court

-vs-

HARVEY BINKLEY, Defendant-Appellant.) Hon. David E. Evrard, Special Judge

****

OPINION FILED SEPT. 3, 1974

(316 N.E. 2d 376)

LOWDERMILK, Judge.

Vern Hendrickson, plaintiff-appellant, was married to Betty Ann Hendrickson, daughter of Harvey Binkley, defendant-appellee. On March 24, 1967 the Hendricksons were divorced and the custody of Douglas Scott Hendrickson, then three years of age, was awarded to Betty Hendrickson.

About a year prior to the granting of the divorce appellant left his wife and son, who then moved to Corydon, Indiana, with her parents. The son, Douglas Scott, has lived with them since that time, although his mother moved to Louisville in 1969 because of her employment. She died in August, 1972, and was still calling her parents' home her place of residence.

Appellant, after the said divorce, did, in February of 1968, marry a woman with three children by a previous marriage.

In October, 1972, appellant, Hendrickson, attempted to secure the custody of Douglas Scott Hendrickson and was refused the right of visitation. He again made an attempt to have visitation with the boy and secure his custody for a visit and was again denied that right.

Following these refusals, appellee filed a petition for the custody of the child which was heard and denied, after which appellant ceased to make support payments. The record further discloses that many payments that had been made by the appellant had not at that time been picked up from the Clerk's office.

Appellant then filed for writ of habeas corpus seeking custody of his son, Douglas Scott, to which writ defendant-appellee filed his return, alleging, among other things, that appellant was not a fit and proper person to have the custody of the child and that it was to the best interest of the child that he remain in the home of the appellee.

The evidence discloses appellant has a responsible job with a salary of $15,500 per annum and lives with his present wife and her three children in a modern, five bedroom home in Crawfordsville, Indiana, which he is buying.

Appellant's wife testified she would like to have the boy live with them in their home and when Douglas Scott visited with them he appeared to have fun and to be happy.

The evidence in behalf of the appellee was that Douglas Scott was ten years old, did well in school, was happy on the farm and wanted to be a farmer. He participated in 4-H activities, in scouting, and attends church regularly. His home life appears to be a happy one.

Special bill of exceptions number two in the transcript contains docket entries of the original divorce and is replete with petitions to modify the decree in this cause and affidavits for citation and to modify, most of which were filed by the appellant and were principally in an attempt to be able to visit and see his son, Douglas Scott, or have the said son visit with him.

The evidence further disclosed that appellant has had difficulty in his visitations

with his son from the time of the divorce to the time of the habeas corpus action. There is a dispute as to appellant's failure to pay dental bills. The mother-in-law testified she informed appellant there would be dental bills, but never told him the amounts of dental bills if any.

Following trial the court entered its judgment that *it was to the best interests and welfare of the child, Douglas Hendrickson,* that his custody be awarded to appellee Binkley and Mrs. Binkley, and so ordered.

Appellant's motion to correct errors was timely filed and ultimately presented for review the following issues:

1. Whether the facts presented a case in which the custody of the child should be awarded to the grandfather, appellee, instead of the surviving father, appellant.

2. Whether the grandfather, appellee, in the absence of any showing that the father was an unsuitable person to have custody, was entitled to the custody of the child.

3. The trial court committed an error of law in that the judgment of the court was contrary to law.

Pursuant to Ind.Rules of Procedure, Appellate Rule 8.3(A)(7), these issues shall be grouped together and treated as one.

[1] It is a well settled rule that divorce proceedings terminate entirely and die with the death of the spouse of the survivor. State ex rel. Gregory v. Superior Court, etc. (1961), 242 Ind. 42, 48, 49, 50, 176 N.E.2d 126.

The *Gregory* case, *supra,* cited the case of Combs v. Gilley (1941), 219 Ind. 139, 145, 36 N.E.2d 776, which recited the rule of common law as follows:

"'"Both under the common law and the statutes of this state, the natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be entrusted with their care, control and education." Gilmore v. Kitson (1905), 165 Ind. 402, 406, 74 N.E. 1083, 1084.'

. . . Being entitled on the death of the mother, in the absence of any showing in a proper forum, that he was an unsuitable person to have such care and custody, he would by operation of law, be entitled to have such care and custody, and could for the sake of the children permit such custody to be vested temporarily in persons other than himself."

See, also, 24 Am.Jur.2d, Divorce and Separation, § 806, Death of Custodian, p. 915.

74 A.L.R. 1353 states:

"The prevailing rule clearly is, that upon the death of the parent who has custody under a divorce decree, the right to custody automatically inures to the surviving parent."

In Sanders v. Sanders (1974), Ind.App., 310 N.E.2d 905, 907, Chief Judge Hoffman of this court, in discussing the problem we have before us, said:

"The cases recognize the common-law rule that the natural parents of a minor child are entitled to custody of the child, except where they are shown to be unsuitable persons to be entrusted with the care, control and education of the child.

. . . Thus, it has been held that these parental rights must be given a full consideration and due weight in custody proceedings, although they are subordinated to the welfare of the children. . . . However, this parental right is not cut off by a determination of custody adverse to a parent, and it may serve as a basis for a later award of custody to that parent when the circumstances surrounding the original award have changed. . . ."

See, Annotation in 39 A.L.R.2d 258.

[2] The other construction of law in Indiana is that the "best interests" of the child are paramount to the presumption in favor of the surviving parent and therefore custody of a child is not controlled by hard and fast rules of law. This proposition is exemplified in Gilchrist v. Gilchrist (1947), 225 Ind. 367, 75 N.E.2d 417, 419, wherein the court stated:

". . . ordinarily a parent who is of good character and reasonably able to provide for his or her child is entitled to its custody as against others. . . . The rights of parents, however, are not absolute. They must yield to the welfare of the child. Its welfare and best interest are the paramount and controlling considerations in all disputes over the custody of a child . . . The disposition of children is not controlled by hard and fast rules of law but by the exercise of the sound judicial discretion of the court confronted with the problem. . . ."

In Gilmore v. Kitson (1905), 165 Ind. 402, 74 N.E. 1083, the court, in discussing the fundamental principle from which the above discussed branches of law were derived, said, among other things:

". . . The principle of the welfare of the child may be applied to defeat the claims of a parent *when he has voluntarily relinquished to others* the custody and care of his child until the affections of the child and its foster parents have become so firmly interwoven that to sunder them would seriously mar and endanger the future happiness and welfare of the child." (Our emphasis.)

In *Kitson,* the natural father was entitled to the custody of his daughter after the death of his wife, as against his wife's sister, though the latter was better off financially and perhaps could have afforded the child more advantages.

It is material to the result reached in the case at bar to consider that the custody of the child, Douglas Scott, was awarded to his mother by the court and was *not voluntarily relinquished to others.* (In this case, the appellee and his wife.)

There is further evidence in the record that corroborates the fact the appellant did not voluntarily relinquish the custody of his son as the record shows he successfully resisted the petition of appellee to obtain the custody of his son after the death of his former wife.

[3] A reasonable construction of the hereinabove cited cases which utilize the "best interest" test to custody disputes between natural parents and third parties came to the correct conclusion but by a different procedure than that used in *Kitson, supra.* That is, *Kitson* and the majority rule utilizes the three step approach. First, it is presumed it will be in the best interests of the child to be placed in the custody of the natural parent. Secondly, to rebut this presumption it must be shown by the attacking party that there is, (a) unfitness, (b) long acquiescence, or (c) voluntary relinquishment such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. The third step is that upon a showing of one of these above three factors, then it will be in the best interests of the child to be placed with the third party.

The case at bar involves a surviving parent against a third party (appellee—maternal grandfather) and therefore requires a showing of one of the three factors of the "best interest" test.

Appellant's evidence as to fitness was that he was remarried and had three stepchildren. They lived in a five bedroom home in what appeared from the evidence to be a beautiful setting near Crawfordsville, Indiana. He had a job of sufficient means to support his family, including Douglas Scott. An attempt was made to show that at the time of the divorce appellant was an unfit parent to have the custody of the child but there was no evidence adduced in the habeas corpus hearing to indicate such at the present time.

[4] The burden was on appellee to make such proof of unfitness at the present time to avail himself of its benefits. Duckworth v. Duckworth (1932), 203 Ind. 276, 179 N.E. 773, 776.

The evidence is, further, that appellant made support payments to the Clerk as ordered and that the payments were never withdrawn from the Clerk's office by the appellee. (It is not clear if the mother accepted the support payments before her death. The support record was not placed in evidence and we are deprived of the benefit of having the exhibit showing the support paid in and paid out.)

As to long acquiescence, in that Douglas Scott lived with his grandparents, we must necessarily conclude from the facts before us that there was no long acquiescence. After the death of Douglas Scott's mother, the appellee brought an action to get the custody of Douglas Scott awarded to him, which was denied. This was followed by the habeas corpus proceeding we are now being called upon to determine in this appeal.

Analogous to the issue of child custody is the issue of adoption which was discussed in In Re Bryant's Adoption (1963), 134 Ind.App. 480, 189 N.E.2d 593. In referring to cases involving guardianship, divorce, or habeas corpus proceedings, the *Bryant* court remarked that the courts are more inclined to look at the material welfare of the child than to the rights of the natural parents.

> "Nevertheless, these cases are interwoven with a strong fiber of judicial protection to help bind the parent and child in their natural relationship, i. e., '* * * where the child is in the hands of a third person, that presumption is in favor of the father.' State, on the relation of Sharpe v. Banks (1865), 25 Ind. 495."
>
> *Bryant, supra*, 189 N.E.2d at 598.

The *Bryant* court further remarked that there must be strong and cogent reasons to justify the withholding of this presumption and further stated:

> "While, as stated hereinabove, some confusion exists in the application of the 'child's best interest rule' it is never an issue for judicial determination in an adversary adoption proceeding until the ultimate fact of 'abandonment or desertion' or 'failure to support', has been first established by clear, cogent and indubitable evidence. If we were to sustain the trial court's decision in the case before us we would by judicial precedent, lend approval to and provide a media for, the advance of governmental paternalism."
>
> 189 N.E.2d at 600.

[5] Similarly, in custody cases, especially as here where a certain permanency of custody is involved, the court cannot determine that it is in the best interests of the child to be placed within the custody of

a third party, as against the presumption favoring the natural parent, unless the trial court has first determined from clear and cogent evidence that there is either unfitness of the appellant, long acquiescence, or voluntary relinquishment. If the "best interest rule" was the only standard needed without anything else, to deprive the natural parent of custody of his own child, then what is to keep the government or third parties from passing judgment with little, if any, care for the rights of natural parents. In other words, a child might be taken away from the natural parent and given to a third party simply by showing that a third party could provide the better things in life for the child and therefore the "best interest" of the child would be satisfied by being placed with a third party.

[6] The evidence does not disclose any unfitness, long acquiescence, or voluntary relinquishment of the appellant father, surviving parent. We now hold as a matter of law the appellant father is entitled to the custody of the child, Douglas Scott Hendrickson, absent any such showing.

Judgment reversed and remanded with instructions to the trial court to enter judgment herein awarding the care, control and custody of Douglas Scott Hendrickson, minor son of the appellant, Vern Hendrickson, to Vern Hendrickson and for any further proceedings not inconsistent with this opinion.

ROBERTSON, P. J., and LYBROOK, J., concur.

Supreme Court, U.S.
FILED
OCT 4 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-322

FRED C. TALLANT, SR.,
WILLIAM M. WOMACK, JR.,

Petitioners,

v.

JAMES H. HENSON,
UNITED STATES MARSHAL
NORTHERN DISTRICT OF GEORGIA,

AND

ALLEN L. CHANCEY, JR.
UNITED STATES MAGISTRATE
NORTHERN DISTRICT OF GEORGIA,

Respondents

MOTION FOR LEAVE TO FILE PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS, PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS, AND BRIEF IN SUPPORT THEREOF

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UNITED STATES CONSTITUTION

Article I 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

FRED C. TALLANT, SR.,
WILLIAM M. WOMACK, JR.,
Petitioners,

v.

JAMES H. HENSON
UNITED STATES MARSHAL
NORTHERN DISTRICT OF GEORGIA,

AND

ALLEN L. CHANCEY, JR.
UNITED STATES MAGISTRATE
NORTHERN DISTRICT OF GEORGIA,
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS

Petitioners Fred C. Tallant, Sr. and William M. Womack, Jr. move the Court for leave to file their petition for award of an original writ of habeas corpus, or an order directing the United States Marshal and the United States Magistrate for the Northern District of Georgia, Respondents herein, to show cause why a writ of habeas corpus should not be granted in accordance with the prayer of

their petition herein, and why this Court should not summarily hear and determine the facts, and dispose of this matter as law and justice require.

Respectfully submitted,

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Petitioners

Subscribed and sworn to before me this_____ day of October, 1975.

_____
Notary Public

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

FRED C. TALLANT, SR.,
WILLIAM M. WOMACK, JR.,

Petitioners,

v.

JAMES H. HENSON
UNITED STATES MARSHAL
NORTHERN DISTRICT OF GEORGIA,

and

ALLEN L. CHANCEY, JR.
UNITED STATES MAGISTRATE
NORTHERN DISTRICT OF GEORGIA,

Respondents.

PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS AND BRIEF IN SUPPORT THEREOF

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C.2241. Petitioners are in custody under the authority of the United States, and committed for trial before the United States District Court for the Northern District of Georgia on October

14, 1975. Their custody is in violation of the Constitution and laws of the United States, as set forth herein below.

REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT

The United States District Court for the Northern District of Georgia has failed and refused to accord petitioners their right to Constitutional due process by denying their various motions to dismiss the unlawfully obtained indictment herein. (See Appendix i and ii herein.) Application to the District Court has been and will be futile because the District Court fails and refuses to follow decisions of this Court which are the supreme law of the land.

Section 20 of the Securities Act of 1933 specifically protects petitioners from the institution of criminal proceedings except upon precondition of an exercise of his discretion by the Attorney General of the United States by which he determines criminal proceedings are "necessary" after review of "evidence" transmitted to him by the Securities and Exchange Commission. In addition, Congress in Section 3 of the Securities Act of 1933 has exempted intrastate transactions from the criminal penalties of that Act. The SEC bypassed the Attorney General in this case, and asked the United States Attorney directly to obtain an indictment.

Petitioners were indicted individually for violation of the criminal provisions of said Act on April 17, 1974, and arraigned before the above Court on August 20, 1974, when they pleaded not guilty. Since then they have had their liberty restrained by respondents United States Marshal James H. Henson and United States Magistrate Allen L. Chancey, Jr. for the Northern District of Georgia by reason of restrictions on their movements and liberty under a non-surety bond while in the custody of respondents.

Petitioners are scheduled for trial before Judge Richard C. Freeman on October 14, 1975, in the said United States District Court for the Northern District of Georgia unless this Court accords them their constitutional right to be free of restraint, and directs that Court to dismiss the indictment in disposing of the matter as law and justice require under 28 U.S.C. 2243. The District Court has failed and refused to follow the supreme law of the land. *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958).

QUESTIONS PRESENTED

1. Whether petitioners can be lawfully indicted and prosecuted for alleged violation of Section 17 of the Securities Act of 1933 on the basis of intrastate securities transactions specifically exempted by Congress from the criminal penalties of said Act?

2. Whether petitioners can be lawfully indicted and prosecuted for violation of Section 17 of the Securities Act of 1933 by the Securities and Exchange Commission and the United States Attorney without first according petitioners their statutory right to an independent exercise of prosecutive discretion by the Attorney General of the United States to determine whether to "institute the necessary criminal proceedings" as a precondition to indictment as required by Section 20 of said Act?

STATUTORY PROVISIONS INVOLVED

1. 15 U.S.C. 77c:

> "(a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities: . . . .
>
> (ii) Any security which is part of an issue offered and sold only to persons resident

within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory."

2. 15 U.S.C. 77q:

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly –

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing

the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section."

3. 15 U.S.C. 77t (b):

"Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Terrirtory, or the United States District Court for the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received."

4. U.S.C. 77x:

"Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission

under the authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

STATEMENT OF CASE

Petitioners are principal officers and directors and controlling persons of Preferred Land Corporation, a publicly owned Georgia corporation with 7,311,539 Class A common shares and 100,000 Class B common shares outstanding in the ownership of approximately 5,000 Georgia shareholders. As at fiscal year end May 31, 1975, the corporation's assets were $22,429,049; liabilities were $12,175,065; shareholders' equity was $10,253,984; and retained earnings were $1,684,662. The corporation buys, sells and develops land. It was chartered by the Superior Court of Fulton County, Georgia on May 18, 1967 and has its main office in Atlanta, Georgia. Its authorized capital stock is 8,000,000 shares of $0.05 par value Class A common stock and 2,000,000 shares of $0.05 par value Class B common stock. Petitioners own all of the 100,000 shares of outstanding Class B stock. The Class A stock was distributed intrastate to Georgia residents only upon registration of the shares authorized and approval of various prospectuses by the Securities Commissioner of the State of Georgia, who issued licenses for the sale of the Class A shares to Georgia residents, as follows:

Date	Georgia Issuer's License No.	Share Price	Number of Shares
June 23, 1967	No. 67-39	10¢	1,200,000
October 23, 1967	No. 67-66	25¢	1,100,000
April 1, 1968	No. 68-13	50¢	1,100,000
August 21, 1968	No. 68-43	$1.00	1,100,000
January 17, 1969	No. 69-2	$2.00	1,100,000
July 3, 1969	No. 69-54	$3.00	1,100,000
January 13, 1970	No. 70-2	$5.00	1,000,000

All of the above issues of securities were distributed pursuant to the referred-to "Issuer's Licenses For the Sale of Securities Under the Georgia Securities Act," signed by Ben W. Fortson, Jr., Secretary of State, Commissioner of Securities of the State of Georgia.

Each offering was by means of a prospectus approved by the Georgia Securities Commissioner, prepared in accordance with the Georgia Securities Act, and covered by an Issuer's Bond with The Travelers Indemnity Company as surety on the bond.

All sales were to Georgia residents only, and exempt from the registration requirements and other provisions of the federal Securities Act of 1933, and were so determined to be after investigation by the Securities and Exchange Commission itself in 1970. As intrastate securities transactions, the above sales were specifically exempt from federal criminal jurisdiction under that Act by the terms of the Act itself.

No criticism or question concerning the corporation, its officers and directors, or petitioners, or the distribution of its securities, has ever been made by the Securities Commissioner of the State of Georgia, and no claim has

ever been made under the Issuer's Bond covering the distributions.

The corporation is now and has always been profitable, solvent, and a successful going concern. It has paid one dividend, and the fair market value of its assets substantially exceeds the cost and/or depreciated cost of assets shown in the independently audited balance sheet. No shareholder has ever involuntarily incurred 1¢ of loss by reason of his investment. All shares were sold in accordance with the terms of the Georgia State licenses outlined herein and on the basis of the material disclosures in the prospectuses approved by the State of Georgia.

In April, 1974 the Securities and Exchange Commission forwarded an investigative file concerning Preferred Land Corporation directly to the United States Attorney for the Northern District of Georgia. On April 4, 1974 the U.S. Department of Justice acknowledged that the SEC had transmitted the file to Atlanta directly for "prosecutive consideration." On April 17, 1974 the United States Attorney obtained an indictment naming petitioners as having allegedly caused prospectuses containing material false statements and admissions to be used in selling the intrastate securities of Preferred Land Corporation, in violation of the civil provisions of Section 17 of the federal Securities Act of 1933, and charging that this violation of the Section 17 civil antifraud provisions constituted a federal crime, despite the fact that Congress has specifically exempted intrastate securities from *all* provisions of the Securities Act of 1933 except the civil antifraud provisions. (*United States v. Tallant and Womack*, Crim. Action No. 74-225A, U.S. Dist. Ct. No. D. Ga.) (App. iii hereto). As a result of the April 17, 1974 indictment, petitioners were arraigned and taken into custody on August 20, 1974 by respondents, and have been in custody since on a non-surety bond

which restricts their liberty and freedom, and are committed for trial under the indictment on October 14, 1975.

ARGUMENT

Under 28 U.S.C. 2241, the Supreme Court may grant an original writ of habeas corpus when a petitioner is in custody "in violation of the Constitution or laws . . . of the United States," or when "He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof. . . ." Petitioners now are in "custody" for purposes of the Great Writ. *Jones v. Cunningham*, 371 U.S. 236 (1963). Under 28 U.S.C. 2243 this Court can and should grant an original writ of habeas corpus to petitioners or direct the respondents to show cause why the Great Writ should not be granted, and should dispose of the matter as law and justice require by dismissing the indictment (*Peyton v. Rowe*, 391 U.S. 54 (1968)), for the following reasons, all as supported by the facts and matters sworn to by petitioners in this application:

1. Congress has not authorized the Securities and Exchange Commission to institute criminal proceedings against petitioners or any target defendant. Instead, Congress, the exclusive law-making and policy-making branch of the national government (Art. I, U. S. Constitution), has mandated that the independent discretion of the Attorney General of the United States shall be interposed between the recommendation of possibly overzealous bureaucrats of the SEC as to whether to "institute the necessary criminal proceedings against petitioners." Section 20 of the Securities Act of 1933 provides that "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority

thereof, it may *in its discretion, bring an action* in any district court of the United States ... *to enjoin* such acts or practices." (Emphasis supplied; 15 U.S.C. 77t(b).)

The above language of Congress is noteworthy and exact – the SEC is *only* given discretion to bring civil injunctive actions for present or prospective violations, not on probable cause, but "whenever it shall appear" a violation may occur. While it may bring an injunction action on mere suspicion, or even on a speculative appearance, which may be only in the eye of the beholder, it may not "institute" criminal proceedings.

Congress did not give the SEC "discretion" to institute *criminal* proceedings on that or any other basis. Instead, it mandated in Section 20 of the 1933 Act (15 U.S.C. 77t (b):

> "The Commission *may* transmit such *evidence* as may be available concerning such acts or practices to the Attorney General who may, *in his discretion,* institute the *necessary* criminal proceedings *under this title."* (Emphasis supplied.)

The above language raises three questions involving the indictment of petitioners and pursuant to which they are held in custody and are committed for trial:

(a) Did the Attorney General exercise *his independent discretion* on SEC transmitted "evidence" as petitioners have a due process right to expect?

(b) Are the criminal proceedings "necessary" in this case, since it is clearly an intrastate matter within the states-rights exemption from the criminal (not civil) penalties of a federal Act and subject only to Georgia State criminal jurisdiction?

(c) Are petitioners, whose sworn statements herein show them to be indicted for *intrastate* securities transactions, *not* indictable under "this title" within the fair meaning of the intrastate exemption from *all* provisions of the Securities Act of 1933 but the civil antifraud provisions of Section 17 (15 U.S.C. 77(c)(a)(ii))?

The answer to the first question is "No." On April 4, 1974 the Assistant Attorney General wrote to the United States Attorney clearly revealing that the SEC, in its discretion, had bypassed the Attorney General's discretion, contrary to the requirement of Section 20 of the 1933 Act, and transmitted its prosecutive recommendation *directly* from the SEC to the United States Attorney, thus depriving petitioners of their right given by Congress to have an independent exercise of discretion by the Attorney General as to whether criminal proceedings were "necessary," and whether there was probable cause to "institute" criminal proceedings.

That the SEC bypassed the Attorney General is clear beyond question from the following letter of April 4, 1974, sworn to as a true copy by petitioners in this verified application:

"HEP:TJM:EJB:efs
113-19-26

APR 4 1974
ADMITTED
Government Exhibit
2
84=82 - A

Mr. John W. Stokes, Jr.
United States Attorney
Atlanta, Georgia

Re: Preferred Land Corporation

Dear Mr. Stokes:

We understand that the Securities and Exchange Commission has referred its investigative files to you in the above matter for prosecutive consideration and that the Statute of Limitations may soon bar prosecution. Please advise us if we can be of any assistance to you in expediting the handling of this matter.

Sincerely,

HENRY E. PETERSEN
Assistant Attorney General
Criminal Division "

By: THOMAS J. McTIERNAN

This Court has said that when Congress vests "discretion" in an official, citizens have a constitutional right to have that discretion exercised in good faith – not bypassed. In a habeas corpus proceeding in this Court's landmark case of *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1953), it was said:

> "And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."

In the case at bar, Congress has denied the SEC the right to sidestep the Attorney General and his discretion. In the *Accardi* case this Court objected to the failure of the Board of Immigration Appeals to exercise its discretion as to a deportation order:

> ". . .we object to the Board's alleged *failure* to exercise its own discretion. . ." (347 U.S. at 268)

Petitioners herein object to the Attorney General's failure to exercise his own discretion as to whether institution of criminal proceedings against them is "necessary" in this case. They have a right under the *Accardi* case to an exercise of discretion by the Attorney General.

In the *Accardi* case, *supra*, this Court said:

> "The crucial question is whether the alleged conduct of the Attorney General deprived petitioner of any of the rights guaranteed him by the statute. . ."

The first question, then, raised by petitioners in the case at bar is whether the SEC, by sidestepping the Attorney General's discretion, deprived them of the rights guaranteed by Section 20 of the Securities Act of 1933 (15 U.S.C. 77t(b)) to have an independent exercise of *his* discretion by the Attorney General based on "evidence" transmitted to him by the SEC as a necessary *precondition* to a valid indictment. Petitioners submit that the conduct of the SEC did just that.

Petitioners' view is supported by this Court's decision in *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820 (1974), where it was held that Congress did not intend that the power to authorize wiretap applications be exercised by any official other than the Attorney General himself, as designated by Congress. That case involved the collateral question of whether the Attorney General could delegate his "discretion." This Court said he could not. This Court went farther and held that the Attorney General must exercise his discretion to authorize wire taps *before* any application to a court is made, and rejected the suggestion that he can later ratify actions taken by his assistant in his absence (416 U.S. ____, 94 S.Ct. at 1830, footnote 12). In the *Giordano* case it was

held that wire-tap evidence obtained as a result of authority unlawfully granted by an assistant to whom the Attorney General had delegated his discretionary power must be suppressed under the Fourth Amendment. In the case at bar, petitioners urge that an indictment obtained on request of the SEC by the United States Attorney *prior* to a good faith and independent exercise of his "discretion" by the Attorney General as a critical and necessary precondition as to whether institution of criminal proceedings against petitioners was "necessary" under Section 20 of the 1933 Act, should be dismissed. Their custody and restraint of freedom as a result of apprehension under that indictment should be terminated under 28 U.S.C. 2241-43 and the Fifth Amendment. Congress intended that the power to issue original writs of habeas corpus by this Court pursuant to 28 U.S.C. 2241-43 should be used in proper cases, and this is such an extraordinary case.

The importance of an independent exercise of his own prosecutive discretion by the Attorney General in accordance with the plain language of Section 20 of the 1933 Act (15 U.S.C. 77t(b)) cannot be overemphasized. Nearly 40 years ago former Justice Jackson of this Court, when he was Attorney General, gave an address entitled "The Federal Prosecutor" at the Second Annual Conference of United States Attorneys held in the Department of Justice Building on April 1, 1940 (see 24 J. Am. Jud. Soc. 18 (1940) for text), at which he said:

> "The prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends

> interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial. . . . While the prosecutor at his best is one of the most beneficient forces in our society, when he acts from malice or other base motives, he is one of the worst. . .
>
> "With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."

The operation of our national securities markets as a capital-raising mechanism in a free-enterprise society is vital and in need of public confidence. Because of the adverse impact of wholesale criminal prosecutions when injunctions, administrative proceedings, and lesser sanctions better serve the cause of justice, Congress has removed institution of federal criminal proceedings under the 1933 Act from the discretion of the SEC or United States Attorney. Rather than risk the ills of prosecutive overkill in the securities field, where federal and state laws overlap, where important and headline-exciting local businessmen are apt to be involved, and where the vague words of the federal securities laws are peculiarly susceptible of wide-swinging interpretations (e.g., Section 24 of the 1933 Act imposes 5 years or $5,000 or both as a penalty for willful violation of "any of the provisions of this subchapter," a vague statute stretching over 27 separate paragraphs and many pages, and each of which has been subjected to dozens of different interpretations in 90 federal district courts in hundreds of cases and thousands of SEC administrative and staff interpretations since 1933), Congress has required the SEC to transmit its "evidence" to the Attorney General himself,

not the United States Attorney, for an independent exercise of the Attorney General's "discretion" concerning whether it is "necessary" in a given case to "institute . . . criminal proceedings" (15 U.S.C. 77t(b)).

In this case, the discretion of the Attorney General was sidestepped, in flagrant violation of the very words of Section 20 of the Act and this Court's holdings in *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) and *U.S. v. Giardano*, 416 U.S. 505, 94 S.Ct. 1830 (1974).

A federal grand jury has no jurisdiction to return an indictment and a United States Attorney has no authority to seek an indictment for alleged criminal violations of the Securities Act of 1933, absent an independent exercise of prosecutive discretion by the Attorney General himself as a necessary precondition to the institution of criminal proceedings. Petitioners have a constitutional right to have the indictment herein dismissed forthwith, rather than to suffer the ordeal and destructive impact of a criminal trial.

The answer to the second question posed by petitioners, i.e. is federal criminal prosecution "necessary," the answer again is "No." Congress has not made the criminal penalties of the 1933 Act applicable to intrastate transactions.

Section 24 of the 1933 Act is applicable only to interstate securities transactions (15 U.S.C. 77x). Section 3(a)(ii) of the Act (15 U.S.C. 77c(a)(ii)) specifically states that the Act "shall not apply" to *intrastate* transactions of the kind involved herein "except as hereinafter *expressly* provided." (Emphasis supplied.) In Section 17(c) of the Act, antifraud section, it is specifically provided that the Section 3 intrastate exemption does not apply "to the provisions of this section" – i.e., Section 17 specifically, and no other.

The exercise of *his* discretion by the Attorney General on "evidence" transmitted by the Securities and Exchange Commission ("SEC") as a necessary precondition to institution of criminal proceedings under the 1933 Act serves two national policies. First, it assures that the mature and independent prosecutive judgment of a cabinet officer comes into play before civil or administrative proceedings are rejected and criminal proceedings instituted under the 1933 Act. Second, it protects persons like petitioners from administrative judgments of regulatory bureaucrats, who may be totally unfamiliar with the Fifth and Sixth Amendments or the fine tuning of our criminal justice system.

There is no similar specific exeption to the intrastate exemption in the criminal penalty Section 24 of the 1933 Act, or, for that matter, in the criminal reference Section 20 of the Act (15 U.S.C. 77x and 77t(b)). Thus it must follow that Congress simply has not made intrastate securities transactions subject to federal criminal jurisdiction under the 1933 Act. That has been left as a state, not a federal, matter. This is consistent with the Ninth and Tenth Amendments, and the federal-state system of dividing interstate and intrastate jurisdiction.

This Court can see a garbled stretching of the law in the very words of the indictment attached hereto as Appendix iii. The alleged 1933 Act violations on which the entire indictment is based are contained in the first five Counts. Each of Counts One through Five, it may be seen, alleges material false statements and admissions "all in violation of Section 77q(a), Title 15, U.S. Code." Then underneath is a subscript "$10,000/2 years or both."

The cited section is Section 17 of the 1933 Act, the civil, not the criminal section, which says not one word about "$10,000/2 years or both," or any other penalty. Section 17 makes certain violative conduct "unlawful."

But that "unlawful" conduct does not become criminal under the 1933 Act unless it is "willful" as provided in Section 24 of the Act. The statements in the indictment are false on their face and would mislead a jury. There is no criminal penalty in Section 77q(a), Title 15, U.S. Code. The criminal penalty is contained in Section 77x, Title 15, U.S. Code, and is "$5,000/5 years or both," but is made specifically *not* applicable to intrastate transactions by Section 77c, Title 15, U.S. Code.

And so it may be seen that petitioners have not been and are not now indictable under Section 77q(a), Title 15, U.S. Code, as cited by the indictment, since that is not a criminal section and imposes no penalty. It only makes violations "unlawful," a civil wrong. Section 77x alone makes "willful" violations criminal, and subject to fine or imprisonment. Since *intrastate* transactions are exempt from the criminal penalties for "willful" violation, all as outlined hereinabove, there is no jurisdiction in a federal grand jury to indict for violation of Section 17 on the basis of *intrastate* transactions. Thus, the answer to the third question posed by petitioners in this application, i.e., whether they are indictable under Section 77q(a), Title 15, U.S. Code, must be yet another "No."

This Court has said that while mere error in a proceeding is not sufficient to support a grant of the writ, that "Deprivation . . .of basic and fundamental procedural safeguards, an assertion of power to act beyond the authority granted . . ., and action without evidence. . . ," are examples of the showing necessary. *Eagles v. Samuels,* 329 U.S. 304, 313 (1946). Petitioners submit their case makes the necessary showing. *Carafas v. LaVallee,* 391 U.S. 234 (1968).

This Court has reaffirmed Chief Justice Marshall's thought that decisions of this Court, like the Constitution

itself and the laws made thereunder, are the supreme law of the land under Article VI, and that judges, like all other officers, are bound by their oaths under Article VI to obey the spirit as well as the letter, the basic principle as well as the rule of the case, of its decisions. *Cooper v. Aaron,* 358 U.S. 1 (1958). If *Cooper v. Aaron* means what it says, then the *Accardi* and *Giordano* cases make it imperative that this Court dismiss the indictment herein for want of exercise of his discretion by the Attorney General as a precondition for institution of criminal proceedings. Failure of the district court to abide by the rule in the *Accardi* and *Giordano* cases by dismissing the indictment on grounds petitioners have been denied the procedural safeguards given them by Congress in Section 20 of the 1933 Act and Section 3 of that Act, deprives petitioners of due process. The District Court has failed its duty to obey the supreme law of the land as set out in the *Accardi* and *Giordano* cases.

CONCLUSION

For the reasons set forth herein, petitioners request that this Court forthwith award them the Great Writ or issue an order directing the respondents to show cause why the writ should not be granted, and that the Court summarily hear and determine the facts, and dispose of the matter as law and justice require, pursuant to 28 U.S.C. 2243, and as requested by petitioners herein. If this Court will not vindicate petitioners' rights, who will? This is the rare and exceptional case where only an original writ of habeas corpus awarded by this Court, and the disposition of the matter per 28 U.S.C. 2243, will do justice at a time when it counts. See *Ex parte Hudgings,* 249

U.S. 378 (1919); *Matter of Heff,* 197 U.S. 488 (1905); *Ex parte Grossman,* 267 U.S. 87 (1925).

Respectfully submitted,

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Petitioners

Subscribed and sworn to before me this _____ day of October, 1975.

_____
Notary Public

APPENDIX i

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE UNITED STATES	:	
vs.	:	CRIMINAL ACTION
	:	No. 74-225-A
FRED C. TALLANT, *ET AL.*	:	

[Filed June 23, 1975]

ORDER

This is a prosecution for fraud in the sale of securities, mail fraud, conspiracy, and obstruction of justice. *See* 15 U.S.C. § 77q(a); 18 U.S.C. §§ 371, 1341 and 1505. In a prior order, this court denied in part defendants' motion to dismiss the indictment based on objections to the array of the Grand Jury, but deferred a final ruling pending submission of evidence by the Government regarding the vote of the Grand Jury. *United States v. Tallant,* Criminal Action No. 74-225A (N.D. Ga. March 11, 1975). The Government has filed an affidavit to the effect that fifteen grand jurors voted to return the indictment; therefore, as noted in the prior order, the disqualification of one of their members does not compel dismissal of the indictment. *See id;* Rules 6(b)(2) and 6(f), Fed. R. Crim. P. Defendants concede that this information requires rejection of their motion. Accordingly, the motion to dismiss the indictment because of defects in the array of the Grand Jury is DENIED.

This action is also pending on several other motions, including "combined motions" for discovery and inspection, a motion to inspect Grand Jury minutes, a motion to dismiss the indictment, and a motion for a bill of particulars. These motions will be discussed seriatim.

In the "combined motions", defendants seek discovery, as pointed out by the Government, of virtually the entirety of the Government's case. Defendants seek to discover all written, as well as oral statements made by the defendants to Government agents; all tangible and documentary evidence in the possession of the Government; a list of all Government witnesses, including informants and other persons having information relevant to the charges in the indictment; copies of "any prior criminal record [of Government witnesses?] . . . available to the attorney for the Government;" and all evidence favorable to the defendants. Defendants predicate their motion on Rules 16 and 17(c), Fed. R. Crim. P. and the due process clause. In opposition, the Government points out that Rule 17(c) is not a discovery device, *e.g., Bowman Dairy Co. v. United States,* 341 U.S. 214 (1951); that some of the matters raised in this motion are more properly raised in the motion for a bill of particulars; that some of the information sought is not discoverable under the Jencks Act; and that a request for virtually all of the Government's tangible and documentary evidence is unreasonable and overbroad, and impermissible under Rule 16(b). The Government's contentions in this regard are correct; and moreover, it appears, on review of the Government's response, that some of the information sought by the instant motion has been provided by the Government, thereby rendering a portion of the motion moot. Arguably the only portion of the motion which may not be moot deals with the production of documentary and tangible evidence, *see* Local Court R. 181.414; and this court agrees that a generalized request for

such evidence is insufficient. On the other hand, the old, strict limitations on discovery, some of which the Government obviously seeks to rely on in this action, have largely been eliminated by modern practice. *See generally* 8 J. Moore, *Moore's Federal Practice* ¶16.05[4] (1975). The emphasis under modern practice is on reasonableness and cooperation by counsel. This emphasis is carried forward in the local rules of this court. *See* Local Court R. 181.43.

In accordance with the foregoing, it is inappropriate for this court to rule on the remaining viable portions, if any, of the motion for discovery at this time. Should defendants desire additional discovery, they should ensure that their request fully complies with the letter and spirit of Local Court R. 181.43, *et seq.* Furthermore, to the extent defendants desire additional discovery pursuant to Rule 16, Fed. R. Crim. P., they should fully comply with Local Rule 91.5 (conference with opposing counsel) and Local Rule 91.1 (motion must be accompanied by memorandum of law). Accordingly, the "combined motions" are hereby DENIED as moot, without prejudice to the filing of subsequent motions for discovery, not later than fifteen (15) days from the date of this order, upon compliance with the aforementioned procedural requirements.

The motion to inspect Grand Jury minutes has also been mooted in part by the aforementioned affidavit relating to the vote of the Grand Jury, to the extent that the motion is predicated on possible undue influence by the disqualified juror. The other portions of the motion remain viable; however, it is evident that defendants seek, in part, to challenge the sufficiency of the Government's evidence presented to the Grand Jury. It is well-settled that an indictment is not subject to challenge on the ground that the Grand Jury acted on the basis of inadequate or incompetent evidence. *See, e.g.,*

United States v. Calandra, 414 U.S. 338, 345 (1974); *Costello v. United States,* 350 U.S. 359 (1956); *United States v. Newcomb,* 488 F.2d 190 (5th Cir. 1974). As a result, a motion to inspect Grand Jury minutes predicated on this ground is insufficient. Defendants also seek to inspect the Grand Jury minutes to determine the effect of pre-trial publicity on the deliberations of the Grand Jury. Defendants have also filed a motion to dismiss the indictment on this ground. In light of the disposition of this motion, as discussed below, inquiry into the Grand Jury minutes on this ground is unwarranted. As a final matter, the inspection of Grand Jury minutes to determine the effect of defendants' being unable to appear during the deliberations of the Grand Jury is also not warranted, since prospective indictees "may not, as a matter of a constitutional right, compel transcription of the grand jury proceeding, attend the proceedings personally or through counsel, cross-examine witnesses at the proceeding, or introduce evidence or compel the introduction of exculpatory evidence at the proceeding." *Cohen v. Stokes,* Civil Action No. 75-765 (N.D. Ga. April 22, 1975); *reconsideration denied,* (N.D. Ga. May 6, 1975). *See United States v. Calandra, supra.* Accordingly, defendants' motion to inspect the Grand Jury minutes is hereby DENIED.

Defendants have also filed a motion to dismiss the indictment. The indictment in question charges defendants with violation of the securities laws, mail fraud, obstruction of justice, and conspiracy, and consists of twelve counts, containing substantial recitation of overt acts and other information regarding the charges. Because of the length of the indictment, and the length of defendant's motion with regard to dismissal of the indictment, to the extent possible, the court will consider the merits of defendants' arguments in relation to the various counts of the indictment to which they apply.

The first portion of the motion to dismiss relates to Counts I - VI[1] of the indictment. These counts charge defendants with five types of activities alleged to be violative of § 77 of the Securities Act of 1933, 15 U.S.C. §77q(a). Four of these activities are listed in Count I. First, the indictment charges that defendants

> did, directly and indirectly, wilfully and knowingly employ a device, scheme and artifice to defraud, obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which operated and would operate as a fraud and deceit upon purchasers of said securities . . . whom defendants believed could be induced to purchase said securities . . . .

Following this allegation, Count I lists several pages of acts purportedly constituting this violation. In essence, these acts consist of the sale of securities on time payment plans, the reacquisition of the securities upon default by the purchasers, and the resale of the stock as original issue stock. On resale, the defaulted stock was purportedly falsely represented to be original issue stock, the proceeds of which would be used for the purpose of Preferred Land Corporation (hereinafter PLC). This portion of Count I also charges defendants with causing certain corporate records to be falsified in order to conceal the allegedly fraudulent scheme.

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[1] The first portion of defendants' motion specifically relates to Counts I-V of the indictment; but the substance of this portion of the motion applies equally to all of the securities fraud counts, including Count VI.

Paragraph (2) of Count I alleges that "defendants made and caused to be made divers false, misleading and fraudulent representations, pretenses and promises, both orally and in writing, well knowing that said representations . . . were false." The representations listed consist of alleged statements in a prospectus, dated January 8, 1969, regarding the source of the common stock offered by means of that prospectus, the amount and disposition of the net proceeds, and the potentiality of a public market for the shares. No specific instances of "oral" misrepresentations are charged. The third species of conduct charged in Count I relates to the actual marketing of the PLC stock. This portion of the indictment alleges that "defendants concealed and omitted and caused to be concealed and omitted in prospectuses, sales presentations, solicitations and otherwise, material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. . . ." The specific omissions and misstatements relate to the resale of reacquired stock without providing investors with information regarding the disposition of the proceeds of the sale; information consisting of the price at which the stock was reacquired; and information regarding the availability of the stock to employees, officers and directors of PLC and friends of defendant Tallant at substantially lower prices. The last portion of Count I sets forth the overt act necessary to the consummation of the alleged fraudulent scheme and necessary to constitute a violation of the securities laws: the mailing of 1,000 shares of PLC stock, on or about April 18, 1969, to Mary N. Hancock.

In support of their motion to dismiss Count I, defendants reassert, in part, their arguments regarding the insufficiency of the evidence before the Grand Jury, arguing that the allegations in the indictment were part of a "rigged presentation"

in violation of defendants' Fifth Amendment rights. Defendants contend that "[l]ike a spider weaving a web, the U.S. Attorney's office has strung together a series of [legal] business actions . . . to make it look ominous by reciting the large figures as to stock issued, but omitting the *de minimus* figures of the [defaulted] stock . . . [resold by defendants]." Defendants also argue that as they may not be convicted for "causing" violations of the Act, the facts alleged do not constitute a violation of the 1933 Act. Furthermore, defendants contend that all their activities were legal under Georgia law and subject to the intrastate exemption provided by 15 U.S.C. § 77c; therefore defendants argue that these activities may not be violations of federal law. Finally, defendants contend that all stock sold was original issue stock, rather than "defaulted" stock as alleged, arguing that if defendants had been permitted to appear before the Grand Jury, the "truth of the matter" would have been revealed.

To the extent that defendants have repeated arguments with respect to the sufficiency of evidence before the Grand Jury, their contentions have already been disposed of. As noted above, the insufficiency of the evidence before the Grand Jury is not a basis for dismissal of the indictment. Moreover, to the extent that defendants dispute the factual contentions of the indictment, the remedy is to convince the petit jury members, at trial, of the veracity of their side of the story. As a general matter, the question of whether or not a particular defense may be raised by means of a Rule 12(b) motion turns on whether or not that defense may be decided solely on issues of law. *See United States v. Miller,* 491 F.2d 638, 647 (5th Cir. 1974). In essence, a motion to dismiss is appropriate if "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." 8 J. Moore, *supra,* ¶12.04 at 12-15 (Supp. 1975). The defense asserted

in this portion of the instant motion is a defense on the merits and must be asserted at trial; therefore it is necessary to turn to the portion of the motion which may be construed as raising a legal contention which may properly be disposed of by means of a motion to dismiss. In this posture, the question for resolution is whether an indictment which alleges that defendants "caused" reacquired stock to be sold as original issue stock, published misleading statements regarding the stock, and caused falsification of corporate records in furtherance of the scheme states a violation of the 1933 Act.

Defendants argue that a violation of the 1933 Act requires specific intent, and that a series of transactions legal under Georgia law may not constitute a scheme involving specific intent to defraud under federal law. In addition, noting that the transactions in issue purportedly qualify for the aforementioned intrastate exemption, defendants argue that the activities involved here concern essentially Georgia intrastate matters and that it would be unreasonable to require a prospectus legal under Georgia law to meet some unspecified S.E.C. requirement under federal law. Defendants contend that such a result would make the S.E.C. a censor of all Georgia-licensed security transactions.

In response to this argument, the Government correctly notes that the intrastate exemption is not applicable to criminal conduct, such as that charged here: "The exemptions provided in section 77c of this title shall not apply to the provisions of this section." 15 U.S.C. § 77q(c). Similarly, relying on a case involving the mail fraud statute, 18 U.S.C. § 1341, the Government notes that control over the use of the mail lies with Congress and not with the states, and that Congress may forbid any mailing contrary to public policy, whether or not the scheme violates state law. *United States v. Edwards,* 458 F.2d 875, 880 (5th Cir. 1972). *See Parr v.*

United States, 363 U.S. 370 (1960). This court agrees with the Government that these same principles are equally applicable in an action involving mail fraud and securities fraud; for, under 15 U.S.C. § 77q(a), use of the mails is an essential element of the offense. *See, e.g., Harper v. United States,* 143 F.2d 795 (8th Cir. 1944); *Holmes v. United States,* 134 F.2d 125 (8th Cir. 1943). *See generally, United States v. Ashdown,* 509 F.2d 793 (5th Cir. 1975). Thus, irrespective of whether or not the conduct in question violated state law, upon employment of the jurisdictional key, use of the mails, there is no doubt that the federal courts may punish alleged wrongdoers for conduct which violates federal law.

An offense under § 77q of the 1933 Act contains two essential elements: (1) a scheme to defraud purchasers of securities and (2) the use of the mails in furtherance of that scheme. *See Holmes v. United States, supra.* The existence of a scheme to defraud is a question for the jury, *id.;* and, the allegations in the instant complaint are sufficient to set forth such a scheme. What must be shown at trial is that "the scheme had an impact on the investor and that the mails were used in employing the scheme." *United States v. Ashdown, supra.* Defendants also argue that specific intent to defraud must be shown, but this contention is subject to some dispute. *See United States v. Schaefer,* 299 F.2d 625 (7th Cir.), *cert. denied,* 370 U.S. 917 (1962). In any event, allegations that defendants caused certain acts to be done in furtherance of their fraudulent scheme are sufficient to withstand the instant motion to dismiss. *See United States v. Constant,* 501 F.2d 1284, 1286-87 (5th Cir. 1974).

In summary, in considering the sufficiency of an indictment, it is well-settled that an indictment need not be drafted in the precise terms of the statute, but that the indictment is sufficient if it gives the defendants "notice of the

offense . . . charged and permits an accurate determination of the extent to which [they] may plead former acquittal or conviction if future prosecutions are brought against [them]." *Id.* at 1287. The allegations relevant to the charged charged offenses in Count I of the indictment clearly fulfill this standard.

Defendants' allegations with respect to the insufficiency of the other charges relevant to the securities fraud aspect of this case are similar. These charges are contained in Counts II - VI of the indictment. These counts involve separate instances of the same allegedly improper conduct, and incorporate most of the allegations set forth in Count I. This conduct is described as follows:

> On or about April 20, 1969 defendants . . . did, directly and indirectly, wilfully and knowingly, in the offer and sale of securities, . . . by use of the mails, employ the aforesaid scheme and artifice to defraud, obtain monies and properties by means of untrue statements of material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engage in transactions . . . which operated and would operate as a fraud and deceit upon the purchasers of said securities, said use of the mails being as follows: . . . .

These various counts set forth five separate instances in which defendants allegedly used the mails to deliver certificates of PLC stock to defrauded purchasers. For the reasons stated above, these allegations are also sufficient to state violations of the 1933 Act; and defendants' arguments to the contrary are without merit.

Defendants also contend that Counts I - VI should be dismissed because "[b]y no stretch of the mind can it be said Congress intended for prosecutorial discretion in securities cases developed by the S.E.C. and referable to the Attorney General, to be an exercise of prosecutorial discretion to be sub-delegated to a civil service employee [the assistant United States Attorney] instead of a Presidential appointee." In addition, defendants contend that this action is barred by the applicable statute of limitations. *See* 18 U.S.C. § 3282 (5 years).

In response to these contentions, the Government points out that identical claims with respect to the prosecutorial discretion issue have been authoritatively determined adversely to defendants, and defendants do not now contend otherwise. *See Preferred Land Corp. v. Stokes,* Civil Action No. 74-720 (N.D. Ga. Apr. 17, 1974), *aff'd mem.*___ F.2d___ (5th Cir. 1974); *Tallant v. Moye,* ___U.S.___ , 95 S. Ct. 156 (1974) (motion for leave to file writ of mandamus denied); *id.*, ___F.2d___ (5th Cir. 1974). In response to the statute of limitations aspect of the motions, the Government points out that its allegation that the conduct charged in Count I occurred "on or about April 18, 1969" is sufficient to withstand the instant motion. The indictment in question was filed on April 17, 1974. If indeed, the act necessary to execute the scheme charged in Count I, use of the mails, was consummated prior to the listed date, then it is possible that defendants' may be protected by the statute of limitations. *See United States v. Ashdown, supra* at 797-98. This is an evidentiary question which should more properly be raised at trial. *See United States v. Miller, supra.* The other charged acts allegedly

occurred more recently and are apparently not encompassed by the portion of this motion founded on statute of limitations grounds.

Defendants also predicate their motion to dismiss Counts I - VI of the indictment on adverse, pre-trial and pre-indictment publicity. Since this ground applies equally to the indictment in its entirety, it will be discussed last; therefore it is appropriate to turn to defendants' arguments with regard to the other offenses charged in the indictment: mail fraud, obstruction of justice, and conspiracy.

The portions of the indictment relevant to the mail fraud charge consist of Counts VII - X. These counts incorporate certain of the allegations of Count I and list separate instances in which "defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail . . . ." certain materials relevant to the allegedly fraudulent securities transactions in issue. This wording substantially tracks the wording of 18 U.S.C. § 1341 and is clearly sufficient to allege a violation of that statute. *United States v. Constant, supra.* Defendants do not contend otherwise, but argue instead that the alleged fraudulent scheme was completed when the contracts for the sale of securities were entered into, and that the use of the mails was too remote from the alleged misrepresentation by defendants regarding the nature of the stock sold to be an integral or essential part of the alleged scheme. This contention is without merit and has been specifically rejected by the Court of Appeals for the Fifth Circuit: "[I]t is a well-established principle of mail fraud law that use of the mails after the

money [from sale of stock] is obtained may nevertheless be 'for the purpose of executing' the fraud." *United States v. Ashdown, supra* at 799.

The conspiracy charge is contained in Count XI of the complaint, which also lists three overt acts in furtherance of the conspiracy: (1) presentation of falsified stock transfer records to S.E.C. investigators; (2) deposit by defendant Womack of $5,000.00 received as proceeds from the sale of 2,500 shares of PLC stock; and (3) deposit by defendant Tallant of $10,000.00 received as proceeds from the sale of 5,000 shares of PLC stock. Defendants contend that presentation of falsified records to the S.E.C. cannot be an overt act in furtherance of a mail fraud conspiracy, arguing also that until the records are subject to an S.E.C. subpoena, alleged falsification of those records cannot be a violation of 15 U.S.C. § 77q. Finally, defendants contend that overt acts two and three above are normal business transactions and that there is no causal connection between the investors named in those acts and the alleged scheme to defraud. In opposition, the Government points out that two of the investors named in the aforementioned overt acts are also named as being defrauded pursuant to the allegations of Counts IV and V. Furthermore, the Government points out that defendants have not cited any authority in support of their argument that presentation of falsified records to the S.E.C. may not constitute an overt act in furtherance of a stock fraud conspiracy. On the other hand, the Government has cited cases to the effect that showing later perfected actions is sufficient to prove a conspiracy, *e.g., United States v. Milisci,* 465 F.2d 700, 703 (5th Cir.), *cert. denied,* 409 U.S. 1076 (1972); and to the effect that the overt act need not be criminal in

and of itself, *e.g. Reese v. United States,* 353 F.2d 732, 734 (5th Cir. 1965). In sum, the Government argues, and this court agrees that "one overt act, whether lawful or unlawful, committed in pursuance of a conspiracy, is sufficient to charge defendants with commission of an unlawful act." Defendants' arguments to the contrary are without merit.

The last count of the indictment alleges that defendant Womack "corruptly influenced, obstructed and impeded and endeavored to influence, obstruct and impede [an S.E.C. proceeding] . . . in that defendant Womack caused certain stockholder ledger records of Preferred Land Corporation to be falsified and presented them to [the S.E.C.]investigators . . . ." Defendant contends that falsification of records before a proceeding is commenced is not a violation of 18 U.S.C. § 1505, and that presentation of previously falsified records is likewise not a violation. Defendant also argues that this count of the indictment is unduly vague, since it fails to list the persons defendant Womack caused to falsify the entries, the time and date and the manner in which the entries were falsified, and where or on which of the 7,000 pages of ledger entries the falsifications appear. The only authority cited in support of these arguments is *United States v. Batten,* 226 F. Supp. 492 (D.D.C. 1964), *cert. denied* 380 U.S. 912 (1965). This case is not in point, since it involved intimidation of a witness and a motion for judgment of acquittal. In fact, the *Batten* court specifically noted that § 1505 "is broad enough to cover any activity which would influence or intimidate a witness who *might* be called to testify." *Id.* at 494 (emphasis added). Similarly, the statute is broad enough arguably to include falsification of records in anticipation

of an agency subpoena. In any event, this court has concluded the presentation of intentionally falsified records to the S.E.C. constitutes an offense under § 1505. Defendant Womack's arguments to the contrary are without merit.

In response to defendant's vagueness argument, the Government points out that an indictment which sets out the elements of the offense is sufficient, particularly when drafted substantially in the words of the statute. *E.g., United States v. Debrow,* 346 U.S. 374 (1953); *United States v. Fischetti,* 450 F.2d 34 (5th Cir. 1971), *cert. denied* 405 U.S. 1016 (1972); *Esperti v. United States,* 406 F.2d 148 (5th Cir.), *cert. denied* 394 U.S. 100 (1969). Arguably, the indictment might have been more specific as to the dates of the S.E.C. investigation, and the exact date of the hearing at which defendant allegedly presented the falsified records, *see United States v. Alo,* 439 F.2d 751 (2d Cir.), *cert. denied,* 404 U.S. 850 (1971); however, under the circumstances of this case, the omission of such dates does not render Count XII of the indictment so vague as to warrant its dismissal.[2]

The final argument espoused in support of the motion to dismiss relates to allegedly prejudicial pre-trial publicity.

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[2] Some courts have approved indictments containing language to the effect that a defendant "wilfully" violated § 1505. *E.g. United States v. Alo, supra* at 756. Where willfulness is specifically set out in a statute, it is an essential element of the offense and must be charged in the indictment. *E.g. United States v. Fischetti, supra* at 39. Willfulness language does not appear in § 1505; therefore the absence of such language in the instant indictment does not render that indictment defective.

Although defendants' contentions in this regard relate only to the counts founded on the securities law violations, it would seem that prejudicial publicity, if any, would equally taint the entire indictment. In support of their motion, defendants have submitted an exhibit, consisting of fifteen or more newspaper articles published in the Atlanta Journal, during a period of two years, from December, 1972 through February, 1974. Defendants contend that these articles were part of a campaign to encourage enactment of a new Georgia Blue Sky Law, and that they were so slanted against defendants as to appeal to the passions and prejudices of the Grand Jury and the United States Attorney and thereby make them incapable of considering the evidence impartially. In response, the Government notes that all of the articles were published before the indictment was returned, and that the only article appearing thereafter was a technical S.E.C. release not disseminated to the general public. As a result, the Government correctly notes that the question for the court must relate solely to the effect of the pre-indictment publicity on the Grand Jury proceedings.

With regard to this question, the Government argues that dismissal of an indictment because of pre-indictment publicity requires more than mere conjecture regarding possible Grand Jury bias and prejudice, noting that pre-indictment publicity alone is insufficient. *E.g., Estes v. United States,* 335 F.2d 609, 613 (5th Cir. 1964), *cert. denied,* 379 U.S. 964 (1965). This court agrees that defendants have not made a sufficient showing of bias or prejudice on the part of the Grand Jurors or the U.S. Attorney, for there is no doubt that the burden on defendants in such cases is heavy:

> It does not appear that any indictment has thus far been dismissed on [the] ground [of pre-indictment publicity]. Though objection is pitched on the bias of the grand jurors, its underlying basis should probably be a violation of due process, predicated on the generating of prejudicial publicity *by the government.*

8 J. Moore, *supra* ¶6.03[4] at 6-42.3- .4 (emphasis added). There is no allegation or indication in the record that the Government was the driving force behind the various newspaper articles alleged to be prejudicial. Moreover, the articles, albeit somewhat slanted toward the goal of enacting more effective state securities laws, are reasonable examples of investigative journalism which generally recite factual details regarding the various judicial and agency actions involving PLC and its principal officers. In fact, several of the articles discuss lawsuits which were actually instituted by defendants herein. Under these circumstances, this court agrees with the following comments:

> To accept the contention urged by the defendants as a rule of law would produce absurd results since no one who is prominent and well known could be charged with the commission of any crime because the charge against such a person no doubt would cause very large and widespread adverse publicity, precluding an indictment.

United States v. Hoffa, 205 F. Supp. 710, 717 (S.D. Fla.), *cert. denied,* 371 U.S. 892 (1962). If indeed, adverse publicity has or might affect defendants' forthcoming trial, the court has more than adequate resources to alleviate the effects of such publicity. *See Shepard v.*

Maxwell, 384 U.S. 333 (1966). Dismissal of the indictment is not one of the remedies that should be invoked in this case.

Accordingly, for the reasons set forth hereinabove, all of the defendants' objections to the sufficiency of the indictment are without merit; therefore their motion to dismiss the indictment, or certain counts of the indictment, is hereby DENIED.

The final motion submitted by defendants is a motion for a bill of particulars. Defendants' request contains some thirty-five numbered paragraphs, and, as stated by defendants, seeks to discover the "locations, times, persons involved, or the substance of the various alleged criminal violations" charged. As such, this motion is in effect a substitute, in part, for the "combined motions" discussed above and is also directed to the legal sufficiency of the indictment. In response, the Government argues that a motion for a bill of particulars is not intended to provide a means by which defendants may compel the Government to disclose its evidence, concluding that the instant motion should be denied in toto.

The function of a bill of particulars in a criminal case is to render an indictment sufficiently specific to apprise a defendant of the nature and the cause of the accusation in order that he may prepare for trial, may be spared surprise at trial and, after judgment, may be able to plead the record in judgment in bar of a further prosecution for the same offense. *E.g., United States v. Bearden*, 423 F.2d 805 (5th Cir.), *cert. denied*, 400 U.S. 836 (1970); *Downing v. United States*, 348 F.2d 594 (5th Cir.), *cert. denied*, 382 U.S. 901 (1965). Moreover, when the demand goes "to the government's proof rather than to a clarification of the indictment . . . [it] cannot be granted on a

motion for a bill of particulars." *United States v. Smith*, 341 F. Supp. 687, 690 (N.D. Ga. 1972). In the instant case, some of the information sought might serve to clarify the indictment; however, in conjunction with clarification, it is evident that the Government would be required to reveal, in part, evidence relative to the presentation of its case. In this case, the indictment, some fourteen pages long, taken in conjunction with the lengthy S.E.C. investigation and the various judicial actions involving the securities transactions forming the basis for this case, is more than adequate to inform defendants on the nature of the case and enable them to adequately prepare for trial. In fact, this court agrees, in large part with the Government's assertion that "[s]eldom does an indictment go so far to acquaint a defendant with the charges against him." The one deficiency, as noted above, concerns the omission of specific dates regarding the conduct allegedly constituting the obstruction of justice charge in Count XII. In addition, the court has also concluded that disclosure of similar information regarding the dates and places of certain of the conduct charged in paragraphs (2) and (3) of Count I would also be warranted. This information should be provided to enable defendants to properly defend against these charges.

Accordingly, defendants' motion for a bill of particulars is DENIED, except insofar as it relates to information sought by numbered paragraphs (7) - (9), (13), and (35). With respect to the information sought in paragraph (35), the Government is hereby ORDERED to provide defendant Womack with the exact date or dates of the S.E.C. proceedings at which he allegedly presented falsified records. With respect to the information sought in paragraphs (7) - (9), the Government is

hereby ORDERED to inform defendants of the exact dates on which the alleged oral communications were made, the places where they were made, and the persons to whom they were made. With respect to the information sought in paragraph (13), the Government is hereby ORDERED to inform defendants of the dates of the alleged sales presentations and solicitations and similar activities giving rise to the conduct charged in Count I, paragraph (3) of the indictment, as well as the place where these activities were carried out. In all other respects, defendants' motion for a bill of particulars is DENIED.

In sum, this court has DENIED defendants' motion to dismiss because of irregularities in the Grand Jury proceedings, including disqualification of one of the Grand Jurors; DENIED without prejudice the motions for discovery and inspection; DENIED the motion to inspect the Grand Jury minutes; DENIED the motion to dismiss the indictment on the ground of its insufficiency; and DENIED in part and GRANTED in part the motion for a bill of particulars.

IT IS SO ORDERED.

This, the 20th day of June, 1975

/s/ RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

APPENDIX ii

UNITED STATES DISTRICT COURT
NORTHERN DISRICT OF GEORGIA
ATLANTA DIVISION

* * * * *

ORDER

This is a prosecution for fraud in the sale of securities, mail fraud, conspiracy, and obstruction of justice. *See* 15 U.S. §77q(a); 18 U.S.C. §§371, 1341, and 1505. The action is presently before the court on defendants' motion for "severance, election and to dismiss certain counts" and on defendants' motion to reconsider a portion of the order of this court entered on June 20, 1975. These motions will be discussed seriatim.

THE MOTION FOR SEVERANCE

As noted above, this motion is a joint motion for severance and/or for dismissal; however, following the filing of the instant motion, this court entered an order completely disposing of the legal arguments raised by defendants with respect to dismissal of the indictment. *United States v. Tallant*, Crim. Action No. 74-225A (N.D. Ga. June 20, 1975). The essence of these arguments, as expressed in the instant motion, relates to defendants' contention that a series of business transactions legal under Georgia law cannot be illegal under federal law, noting that the securities sales in issue were licensed in Georgia and subject to the "states rights" exemption regarding intrastate sales of securities provided by federal law. In addition, defendants argue that they cannot be convicted of a criminal offense since the provisions of Section 17 of the Securities Act of 1933 only relate to civil and *not* criminal fraud. This latter contention is wholly without merit, as

a brief review of the numerous cases cited by this court in the June 20, 1975 order will indicate. *E.g., United States v. Ashdown,* 509 F.2d 793 (5th Cir. 1975). Similarly, defendants' "states rights" arguments have likewise been disposed of in that order:

> [T]he intrastate exemption is not applicable to criminal conduct, such as that charged here: "The exemptions provided in section 77c of this title shall not apply to the provisions of this section." 15 U.S.C. §77q(c). . . . [C]ontrol over the use of the mail lies with Congress and not with the states, and. . . Congress may forbid any mailing contrary to public policy, whether or not the scheme violates state law. [citations omitted]. ...[T]hese same principles are equally applicable in an action involving mail fraud and securities fraud; for, under 15 U.S.C. §77q(a), use of the mails is an essential element of the offense. [citations omitted]. Thus, *irrespective of whether or not the conduct in question violated state law, upon employment of the jurisdictional key, use of the mails, there is no doubt that the federal courts may punish alleged wrongdoers for conduct which violates federal law.*

United States v. Tallant, supra at p. 8 (emphasis added).

Turning to the arguments specifically related to the question of misjoinder under Rule 8, Fed. R. Crim. P. and the propriety of severance under Rule 14, it is evident that defendants' contentions relate primarily to misjoinder of offenses under Rule 8(a) rather than misjoinder of defendants under Rule 8(b). Under Rule 8(b), the courts have ruled that "improper joinder is inherently prejudicial and that granting of a motion for severance, where there has been misjoinder, is mandatory and not discretionary . . . ."

United States v. Bova, 493 F.2d 33, 35 (5th Cir. 1974). *See McElroy v. United States,* 164 U.S. 76 (1896). This court does not doubt that joinder of two defendants charged with wholly separate offenses, albeit similar offenses, would be inherently prejudicial; however, as discussed in the June 20, 1975 order, the indictment in issue here charges defendants, the president and chief executive officer and the chief financial officer of Preferred Land Corp., with conspiring to effectuate a scheme to defraud the purchasers of Preferred Land securities. As pointed out by the Government, the execution of a single scheme to defraud may involve more than one criminal offense. *E.g., Sanders v. United States,* 415 F.2d 621 (5th Cir. 1969), *cert. denied,* 329 U.S. 792 (1946); *United States v. Anzelmo,* 319 F.2d 1106, 1122-23 (E.D. La. 1970). Similarly, under Rule 8(b), two defendants who have allegedly conspired to effectuate this scheme and who are accordingly guilty of the same offenses, if they are guilty of any offenses at all, may be indicted together, tried together, and ultimately acquitted or convicted together. In fact, even where co-defendants are charged with separate crimes, where the series of transactions are sufficiently interrelated and intertwined, a joint trial would be permissable. *United States v. Strand,* ____ F.2d____, Civil Action No. 74-4096 (5th Cir. Aug. 15, 1975). As a result, further consideration of misjoinder under Rule 8(b) is not warranted.

Defendants do not argue that joinder in this case is "inherently prejudicial" under Rule 8(b), but base their arguments instead on the provisions of Rule 8(a), which reads in relevant part as follows:

> Two or more offenses may be charged in the same indictment . . . in a separate count for each offense if the offenses charged . . . are of the same or similar character or are based on the same

> act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Defendants contend that each offense in the present indictment is based on a different statute with different statutory elements, different facts, different dates, and involving different persons. As a result, defendants argue that the offenses charged "are not offenses of the same character, and they are not based on the same transactions or connected together or parts of a common scheme." In opposition, the Government argues that the essence of the instant action involves a single scheme, charged in count I of the indictment, which must be proved in order to convict defendants of the offenses charged in counts I-X of the indictment, noting also that evidence of the acts charged in counts XI and XII is admissable to prove the requisite intent with respect to the violations alleged in counts I-X. The Government's contentions are correct.

As noted above, the essence of this action involves a series of transactions, consummated over a number of years, which allegedly constitute part and parcel of a scheme to defraud the purchasers of Preferred Land stock. Defendants' contentions to the contrary are simply without merit. Certainly, misjoinder under Rule 8(b) may be *per se* prejudicial, *United States v. Bova, supra*; however, perhaps in recognition that two separate, but otherwise identical trials of the same allegedly illegal scheme would not serve the interests of justice or of judicial economy, defendants do not seek severance for misjoinder under Rule 8(b). Instead, defendants seek severance of the various counts of the indictment according to the offenses charged, *i.e.* defendants seek separate trials of the counts charging securities fraud, mail fraud, conspiracy, and obstruction of justice. *See* Rule 8(a). Alleged misjoinder under Rule 8(a) does not result in "inherent" or *per se*

prejudice; and, pursuant to the terms of Rule 14, the question of severance is committed to the sound discretion of the court. *E.g.,United States v. Pacheco,* 489 F.2d 554 (5th Cir. 1974); *United States v. Perez,* 489 F.2d 51 (5th Cir. 1973), *cert. denied,* 417 U.S. 945 (1974).

The relevant considerations with respect to severance under Rule 14 have been discussed as follows:

> The rules are liberal in permitting joinder at trial, both of offenses and of defendants. Although this permits wide latitude on the prosecution in determining the form in which the case is to be prosecuted the trial court has both the duty and the authority to order a severance at any time during the trial if it believes that impermissible prejudice would otherwise result. Thus, the serious problem of reconciling the sometimes competing interests of trial economy and danger of prejudice to defendants necessarily resides in the discretion of the trial judge. Motions for severance under Rule 14 have rarely been granted and the trial court's decision has not been disturbed absent a clear showing of abuse. [citations omitted.] The general rule has been, and remains, that persons jointly indicted should be tried together, especially in conspiracy cases.

United Stataes v. Perez, supra at 65. Although the distinctions between Rule 8(a) and Rule 8(b) often involve impossibly fine differences of degree; and although misjoinder under Rule 8(b) may sometimes be inherently prejudicial, it is clear that the trial judge may remedy this prejudice at any time, when it appears; however, absent any showing of prejudice whatsoever, inherent or otherwise,

severance is simply not warranted. *Id.* (defendant must show "compelling" prejudice, rather than merely "some" prejudice); *accord, United States v. Pacheco, supra.*

Every complex, multi-count conspiracy case involves some difficulty and confusion to the jury, the court, and the parties, and hence some degree of prejudice; however, the mere fact that the case involves "multitudinous and complex transactions" is not reason to hold separate trials on each aspect of this indictment. *See United States v. Wayman,* 510 F.2d 1020 (5th Cir. 1975). In this case, the relationship between the various counts is quite apparent, and some or all of the evidence necessary to establish the substantive offense charged in count I, is equally necessary to establish the offenses charged in the other counts.[1] *See United States v. Pacheco, supra.* As a result, this court has concluded that joinder of defendants and offenses in this action serves the purposes inherent in Rule 8, by avoiding "duplication of time and effort of both the prosecution and the courts and minimiz[ing] the prejudice to the defendants." *United States v. Gentile, supra,* at 630. Accordingly, defendants' motion for severance or an election under Rule 14 is hereby DENIED.

MOTION FOR RECONSIDERATION

In this motion, defendants once again raise their curious "states rights" arguments founded upon the inapplicable intrastate exemption, arguing also that violation of 15 U.S.C. §77q is not a crime; however, the essence of their argument in support of the instant motion concerns

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[1] "[W]hen the facts underlying each offense are so closely connected that proof of such facts is necessary to establish each offense, joinder of defendants and offenses is proper." *United States v. Gentile, 495* F.2d 626, 630 (5th Cir. 1974).

their contention that the United States Attorney may not usurp the discretion of the Attorney General in determining whether criminal prosecutions may be instituted for violation of the antifraud provisions of the Securities Act of 1933. Defendants argue that this court should make a "specific ruling dismissing the indictment herein in its entirety as improperly obtained by the U.S. Attorney in the absence of an exercise of discretion by the Attorney General under §20g of the Securities Act of 1933 [15 U.S.C. §77t(b)]."

In the prior order, this court noted that these contentions had been authoritatively determined adversely to defendants by three courts, including the United States Supreme Court, *e.g., Tallant v. Moye,* 419 U.S. 821 (1974) (motion for leave to file writ of mandamus denied); however, defendants now argue that these courts did not consider the merits of the arguments, but merely based their decision on the general reluctance of courts to intervene preemptively in the criminal process by the use of extraordinary writs. *See, e.g., Cohen v. Stokes,* Civil Action No. 75-765 (N.D. Ga. April 22, 1975), *reconsideration denied,* (May 6, 1975); *cf. United States v. Calandra,* 414 U.S. 338 (1974). While this contention may be partially correct, insofar as the res judicata or collateral estoppel aspects of defendants' prior applications for extraordinary relief are concerned, this court has reviewed the transcript of the oral hearing conducted before Judge Moye in *Preferred Land Corp. v. Stokes,* Civil Action No. 74-720 (N.D. Ga. Apr. 17, 1974), *aff'd mem.* ___F.2d___ (5th Cir. Dec. 11, 1974); and it is clear that arguments identical to those asserted in the instant motion were also raised in that action. Irrespective of the reasons for the decisions of the various courts on this matter[2]

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[2] None of the courts previously reviewing this issue entered a formal opinion; therefore, it is impossible to determine whether these courts concluded that the actions filed were without merit on conceptual, procedural, or substantive grounds.

this court has concluded that defendants' arguments are without merit.

In support of their arguments, defendants rely on the plain language of 15 U.S.C. §77t(b), the legislative history of a proposed amendment to that statute, and the recent decision of the Supreme Court on a purportedly analogous issue. *See United States v. Giordano,* 416 U.S. 505 (1974). Defendants have not cited any statutory language in 18 U.S.C. §§371, 1341 or 1505, which precludes the exercise of prosecutorial discretion on the part of the United States Attorney, nor have they cited any authority for the proposition that a properly constituted grand jury may not return an indictment for violation of those statutory provisions absent approval from the Attorney General of the United States. Defendants in effect argue that since the discretion to prosecute violations of the securities fraud laws is vested solely in the Attorney General, the prosecution of other interrelated offenses or offenses predicated on the same fraudulent scheme must likewise be vested solely in the Attorney General. This contention is wholly without merit; for such an argument would virtually emasculate the prosecution of federal offenses when any regulatory agency, such as the S.E.C., F.T.C. or H.E.W. arguably has been assigned primary supervisory, investigatory, and civil enforcement authority over the scheme in issue. Defendants' arguments must likewise fail with respect to those counts of the subject indictment predicated solely on violation of the securities laws.[3]

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[3]On review of the order entered in this action on June 20, 1975, this court notes that it erroneously included count VI of the indictment among the securities fraud counts. *See United States v. Tallant, supra* at p. 18 n. 1; *id.* pp. 4-11. This is largely a clerical error which did not affect the substantive outcome of that order, and which may be corrected at any time under Rule 36, Fed. R. Crim. P.

United States v. Giordano, supra, while instructive, does not support defendants' position. In that case, the Court was presented with mandatory terms of the portions of the Omnibus Crime Control and Safe Streets Act of 1968 dealing with issuance of wiretap authorizations by the Attorney General. 18 U.S.C. §2516 (1). The Court concluded that the plain language of the act, as well as its legislative history, precluded issuance of wiretap orders on the initiative of investigative officers, noting that under the statute, "[t]he mature judgment of a *particular, responsible Department of Justice official* is interposed as a critical precondition to any judicial error." *Id.* at 515-16. (emphasis added.)[4] In reaching this conclusion, the Court rejected the Government's argument that the statute in question, by merely vesting a duty in the Attorney General, was not intended to preclude delegation of this duty to other responsible officers under the provisions of 28 U.S.C. §510:

> *As a general proposition, the argument is unexceptionable.* But here the matter of delegation is expressly addressed by §2516 and the power of the Attorney General in this respect is specifically limited to delegating his authority to "any Assistant Attorney General specially designated by the Attorney General." Despite §510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated.

Id. at 514 (emphasis added). As another example of a statute circumscribing the general provisons of § 510, the

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[4]Under the express terms of §2516(1), the particular, responsible official, is "[t]he Attorney General, or any Assistant Attorney General *specially designated* by the Attorney General. . . ." *Id.* (emphasis added.)

Court cited 18 U.S.C. §245(a)(1), which provides for certification by the Attorney General of civil rights prosecutions, "which function of certification may not be delegated." *Id.* There is no similar provision with respect to 15 U.S.C. §77t(b).

A fair reading of the statutory provision in issue indicates that pursuant to the express terms of the statute, it was designed to affect the power of the S.E.C. and not designed to limit the normal power of delegation entrusted to the Attorney General.[5] In fact, the legislative history cited by defendants herein, far from supporting their theory, actually supports the proposition that Congress was simply concerned with the proper boundaries that should be imposed upon the authority of the S.E.C., and did not intend to circumscribe the delegatory discretion of the Attorney General under 28 U.S.C. §510. The statute itself is couched in permissive rather than mandatory terms; and, unlike the wiretap authorization statute construed in *Giordano,* and, unlike 18 U.S.C. §245(a)(1), the statute does not contain an express or implicit limitation on the authority of the Attorney General to "delegate" or to "designate" an appropriate prosecutorial official. As a result, this court agrees with the comments of Solicitor General Bork, contained in his brief on the matter submitted to the Supreme Court in *Tallant v. Moye, supra:*

> [T]he statute, upon which petitioners rely, does not state that stock fraud cases may be brought only when personally authorized by the Attorney

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[5] The statute in question provides in relevant part as follows: "The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter." 15 U.S.C. §77t(b).

> General, but rather that the Securities and Exchange Commission may refer cases to him for prosecution. The evident purpose of this section was to insure that, in cases where the Commission determined that criminal prosecutions were warranted but the United States Attorney declined to prosecute, the Commission would be entitled to have its evidence reviewed by the Attorney General or his delegate.
>
> Moreover, under any construction 15 U.S.C. §77t(b) does not require personal action by the Attorney General, for the Attorney General has power to delegate "any function." 28 U.S.C. §510.

Under *Giordano,* and in light of the arguments of the parties and the plain language of the statute, this court has concluded that irrespective of whether the matter has been authoritatively foreclosed by the aforementioned decisions of the courts that have considered defendants' applications for extraordinary relief, the United States Attorney, and his authorized assistant, did not exceed their authority in presenting this matter to the grand jury and in acting upon the resulting indictment. *Cf. United States v. Parrott,* 248 F. Supp. 196, 199 (D. D.C. 1965) (recommendation to prosecute referred by S.E.C. to U.S. Attorney, but indictment dismissed on speedy trial grounds). *See also United States v. Parrott,* 425 F.2d 972 (2d Cir.), *cert. denied,* 400 U.S. 824 (1970) (affirming conviction on indictment returned in New York). Defendants arguments to the contrary are without merit.

Accordingly, for the reasons hereinabove expressed, defendants' motion for reconsideration is hereby DENIED.

In sum, this court has denied defendants' motion for severance, concluding that a joint trial of the offenses alleged in the indictment and the parties herein would not be inherently prejudicial or otherwise so prejudicial as to be improper under Rule 8(a) or 8(b), thereby warranting severance under Rule 14. The defendants' motion for reconsideration has also been DENIED.

IT IS SO ORDERED.

This, the 16th day of September, 1975.

/s/ RICHARD C. FREEMAN
United States District Judge

APPENDIX iii

IN THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

* * * * *

CRIMINAL INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

1. From on or about May 18, 1967, and continuing up to and including the date of the filing of this indictment, the defendants, FRED C. TALLANT, SR. and WILLIAM M. WOMACK, JR. (hereinafter sometimes singularly referred to by their surnames and collectively as "defendants"), in the Northern District of Georgia and within the jurisdiction of this Court, bu use of the mails in the offer and sale of securities, namely the Class A Common Stock of Preferred Land Corporation (hereinafter referred to as "PLC"), a Georgia corporation, did, directly and indirectly wilfully and knowingly employ a device, scheme and artifice to defraud, obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which operated and would operate as a fraud and deceit upon purchasers of said securities, said purchasers being generally that class of persons (hereinafter sometimes referred to as "PLC investors") whom defendants believed could be induced to purchase said securities, all in the following manner:

(a) On May 18, 1967 defendant TALLANT caused PLC (*i.e.*, Preferred Land Corporation) to be incorporated under the laws of Georgia with an authorized capital of 8,000,000 shares of $.05 par value Class A common stock and 2,000,000 shares of $.05 par value Class B common stock, with offices in Atlanta, Georgia. Shareholders of Class A common stock of PLC were empowered to elect and did elect two directors, while shareholders of Class B common stock of PLC were empowered to elect and did elect three directors. Defendant TALLANT effected control of PLC through ownership of 80% of its outstanding Class B common stock and caused himself to be elected its President and a director and his brother-in-law, defendant WOMACK, to be elected Secretary-Treasurer and a director of PLC.

(b) Defendants TALLANT and/or WOMACK controlled and owned directly or beneficially, several close Georgia corporations, to wit: Tallant Properties, Inc., Tallant and Company, Atlanta Seals, Inc., Fidelity Securities, Inc., The Boston Company and Tri-Equity, Inc., which said corporations defendants utilized in said scheme in the manner hereinafter described.

(c) Commencing on or about May 18, 1967 and continuing to the date of the filing of this indictment, defendants offered and sold and caused to be offered and sold to PLC investors shares of the Class A common stock of PLC for the purported purpose of financing PLC, as follows.

i. On or about June 8, 1967 defendants caused PLC to commence a public offering of 1,200,000 shares of PLC Class A common stock at $.10 per share.

ii. On or about October 16, 1967 defendants caused PLC to commence a public offering of 1,100,000 shares of PLC Class A common stock at $.25 per share.

iii. On or about March 21, 1968 defendants caused PLC to commence a public offering of 1,100,000 shares of PLC Class A common stock at $.50 per share.

iv. On or about August 6, 1968 defendants caused PLC to commence a public offering of 1,100,000 shares of PLC Class A common stock at $1.00 per share.

v. On or about January 8, 1969 defendants caused PLC to commence a public offering of 1,100,000 shares of PLC Class A common stock at $2.00 per share.

vi. On or about June 25, 1969 defendants caused PLC to commence a public offering of 1,100,000 shares of PLC Class A common stock at $3.00 per share.

vii. On or about January 5, 1970 defendants caused PLC to commence a public offering of 1,000,000 shares of PLC Class A common stock at $5.00 per share.

(d) About September 30, 1967 defendants caused PLC to issue to Tallant Properties, Inc. 44,000 shares of PLC Class A common stock for $.10 per share. About March 29, 1968 defendants caused PLC to issue to Tallant Properties, Inc. 2,000 shares of PLC Class A common stock for $.25 per share.

(e) When from time to time during the course of said scheme PLC investors who had purchased shares in the aforesaid $.10, $.25, $.50 and $1.00 offerings on time-payment plans defaulted on their payment defendants caused PLC to foreclose said shares and the close corporations named in sub-paragraph (b) of paragraph 1 of this count to acquire them for the balance due thereon.

(f) When from time to time during the course of said scheme PLC investors who had purchased shares in the aforesaid $.10 and $.50 offerings on time-payment plans default-

ed on their payments, defendants caused PLC to foreclose said shares and defendant TALLANT and a custodian for defendant TALLANT's minor children to acquire them for the balance due thereon.

(g) Defendants caused said shares of PLC Class A common stock so acquired by said close corporations and by defendant TALLANT and said custodian from time to time to be sold to PLC investors at the then current offering price as original issue stock of PLC pursuant to the representation that the proceeds from the sales thereof would be used for specified corporate purposes of PLC when, as defendants at all said times well knew, said shares were not original issue stock of PLC and the proceeds from the sales thereof would not be used for any corporate purposes of PLC, but instead, would be and were diverted to the use and benefit of defendants.

(h) As a further part of said scheme and to cover up said fraudulent acts in order to avoid detection thereof by investigative authorities, during the spring of 1969, the summer of 1970 and again during the spring of 1973, defendants caused certain corporate records of PLC to be falsified and defendants concealed or destroyed and caused to be concealed or destroyed certain of such corporate records.

2. As a further part of said scheme and in order to obtain monies and properties of PLC investors and to induce them to invest in said PLC Class A common stock, defendants made and caused to be made divers false, misleading and fraudulent representations, pretenses and promises, both orally and in writing, well knowing that said representations, pretenses and promises were false, misleading and fraudulent when made, including but not limited to the following:

(a) That the net proceeds to PLC from the sale of all the shares of Class A common stock offered by means of the prospectus dated January 8, 1969, would be $1,870,000;

(b) That approximately 90% of the net proceeds to PLC from the sale of all of the shares of Class A common stock offered by means of the prospectus dated January 8, 1969, would be used by PLC to purchase, develop and sell real property and the remaining 10% of said proceeds would be used by PLC as general working capital;

(c) That there would be a public market for the Class A common stock of PLC; and

(d) That all of the shares being offered were original issue securities of PLC.

3. As a further part of said scheme and in order to obtain monies and properties of PLC investors and to induce them to invest in said PLC Class A common stock, defendants concealed and omitted in prospectuses, sales presentations, solicitations and otherwise, material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, said facts being well known to defendants, including but not limited to the following:

(a) That PLC investors would receive shares of PLC Class A common stock previously acquired by defendant TALLANT at prices substantially lower than the price at which said shares were being offered to them;

(b) That PLC investors would receive shares of PLC Class A common stock previously acquired by a custodian for defendant TALLANT's minor children at prices substantially lower than the price at which said shares were being offered to them;

(c) That PLC investors would receive shares of PLC Class A common stock previously acquired by close corporations controlled by defendants at prices substantially lower than the price at which said shares were being offered to them;

(d) That the monies paid by PLC investors for shares of PLC Class A common stock would not be available to PLC for corporate purposes but would be diverted to the use and benefit of defendants; and

(e) That at the same times PLC investors were offered shares of PLC Class A common stock, employees, officers and directors of PLC and friends of defendant TALLANT were being offered shares of PLC Class A common stock at substantially lower prices.

4. On or about April 18, 1969 defendants FRED C. TALLANT, SR. and WILLIAM M. WOMACK, JR. did, directly and indirectly, wilfully and knowingly, in the offer and sale of securities, namely, the Class A common stock of Preferred Land Corporation, by use of the mails, employ the aforesaid scheme and artifice to defraud, obtain monies and properties by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which operated and would operate as a fraud and deceit upon the purchasers of said securities, including Mary N. Hancock, said use of the mails being as follows: On or about April 18, 1969 at Atlanta, Georgia, in the Northern District of Georgia, defendants caused an envelope containing a certificate for 1000 shares of Preferred Land Corporation Class A common stock to be sent and delivered by the Post Office Department of the United States,

according to the direction thereon, to Mary N. Hancock, 2219 Peachtree Road, N.E., Apartment 9, Atlanta, Georgia 30309; all in violation of Section 77q(a), Title 15, U.S. Code.

$10,000/2 years or both

COUNT TWO

1. The Grand Jury realleges all of the allegations of Count 1 of this indictment except those contained in paragraph numbered 4 thereof.

2. On or about April 20, 1969 defendants FRED C. TALLANT, SR. and WILLIAM M. WOMACK, JR. did, directly and indirectly, wilfully and knowingly, in the offer and sale of securities, namely, the Class A common stock of Preferred Land Corporation, by use of the mails, employ the aforesaid scheme and artifice to defraud, obtain monies and properties by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which oprated and would operate as a fraud and deceit upon the purchasers of said securities, including Larry C. Dukehart, said use of the mails being as follows: On or about April 20, 1969 at Atlanta, Georgia, in the Northern District of Georgia, defendants caused an envelope containing a certificate for 500 shares of Preferred Land Corporation Class A common stock to be sent and delivered by the Post Office Department of the United States, according to the direction thereon, to Larry C. Dukehart, 212 Adair Street, Decatur, Georgia 30030; all in violation of Section 77q(a), Title 15, U.S. Code.

$10,000/2 years or both

COUNT THREE

1. The Grand Jury realleges all of the allegations of Count 1 of this indictment except those contained in paragraph numbered 4 thereof.

2. On or about May 30, 1969 defendants FRED C. TALLANT, SR. and WILLIAM M. WOMACK, JR. did, directly and indirectly, wilfully and knowingly, in the offer and sale of securities, namely, the Class A common stock of Preferred Land Corporation, by use of the mails, employ the aforesaid scheme and artifice to defraud, obtain monies and properties by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which operated and would operate as a fraud and deceit upon the purchasers of said securities, including Mrs. T.T. Jackson, Sr., said use of the mails being as follows: On or about May 30, 1969 at Atlanta, Georgia, in the Northern District of Georgia, defendants caused an envelope containing a certificate for 500 shares of Preferred Land Corporation Class A common stock to be sent and delivered by the Post Office Department of the United States, according to the direction thereon, to Mrs. T.T. Jackson, Sr., 308 Second Avenue, Manchester, Georgia 31816; all in violation of Section 77q(a), Title 15, U.S. Code.

$10,000/2 years or both

COUNT FOUR

1. The Grand Jury realleges all of the allegations of Count 1 of this indictment except those contained in paragraph numbered 4 thereof.

2. On or about May 15, 1969 defendants FRED C. TALLANT, SR. and WILLIAM M. WOMACK, JR. did, directly and indirectly, wilfully and knowingly, in the offer and sale of securities, namely, the Class A common stock of Preferred Land Corporation, by use of the mails, employ the aforesaid scheme and artifice to defraud, obtain monies and properties by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which operated and would operate as a fraud and deceit upon the purchasers of said securities, including Dale R. Brown, said use of the mails being as follows: On or about May 15, 1969 at Atlanta, Georgia, in the Northen District of Georgia, defendants caused an envelope containing a certificate for 5,000 shares of Preferred Land Corporation Class A common stock to be sent and delivered by the Post Office Department of the United States, according to the direction thereon, to Dale R. Brown, 781 San Antonio Drive, N.E., Atlanta, Georgia 30306; all in violation of Section 77 q(a), Title 15, U.S. Code.

$10,000/2 years or both

COUNT FIVE

1. The Grand Jury realleges all of the allegations of Count 1 of this indictment except those contained in paragraph numbered 4 thereof.

2. On or about May 6, 1969 defendants FRED C. TALLANT, SR. and WILLIAM M. WOMACK, JR. did, directly and indirectly, wilfully and knowingly, in the offer and sale of securities, namely, the Class A common stock of Preferred Land Corporation, by use of the mails, employ the afore-

said scheme and artifice to defraud, obtain monies and properties by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which operated and would operate as a fraud and deceit upon the purchasers of said securities, including Kathryn S. James, said use of the mails being as follows: On or about May 6, 1969 at Atlanta, Georgia, in the Northern District of Georgia, defendants caused an envelope containing a certificate for 500 shares of Preferred Land Corporation Class A common stock to be sent and delivered by the Post Office Department of the United States, according to the direction thereon, to Kathryn S. James, 423 Tara Trail, N.W., Atlanta, Georgia 30327; all in violation of Section 77q(a), Title 15, U.S. Code.

$10,000/2 years or both

COUNT SIX

1. The Grand Jury realleges all of the allegations contained in subparagraphs (a), (b), (c), (d), (e), (f), (g) and (h) of paragraph numbered 1 and paragraphs numbered 2 and 3 of Count one of this indictment as constituting and describing a scheme and artifice devised and intended to be devised by defendants FRED C. TALLANT, SR. and WILLIAM M. WOMACK, JR., during the period from on or about May 18, 1967 to on or about the date of the filing of this indictment, to defraud and to obtain monies and properties by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be and were false when made, and said defendants wilfully and knowingly made use of the mails in the following manner:

2. On or about the 2nd day of June, 1969 in the Northern District of Georgia and within the jurisdiction of this Court, defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, a certificate for 2500 shares of Class A common stock of Preferred Land Corporation enclosed in an envelope addressed to Morris I. McDonald, Post Office Box 4941, Atlanta, Georgia 30307, to be sent and delivered by the Post Office Department of the United Stats; all in violation of Section 1341, Title 18, United States Code.

$1,000/5 years or both

COUNT SEVEN

1. The Grand Jury realleges all of the allegations contained in subparagraphs (a), (b), (c), (d), (e), (f), (g), and (h) of paragraph numbered 1 and paragraphs numbered 2 and 3 of Count One of this indictment as constituting and describing a scheme and artifice devised and intended to be devised by defendants FRED C. TALLANT, SR. and WILLIAM M. WOMACK, JR., during the period from on or about May 18, 1967 to on or about the date of the filing of this indictment, to defraud and to obtain monies and properties by means of false and fraudulent pretenses, representations and promises well knowing at the time that the pretenses, representations and promises would be and were false when mailed and said defendants wilfully and knowingly made use of the mails in the following manner:

2. On or about the 22nd day of April, 1969, in the Northern District of Georgia and within the jurisdiction of this Court, defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, a con-

firmation for 1500 shares of the Class A common stock of Preferred Land Corporation enclosed in an envelope addressed to Ronald L. Case, 3297 Embry Hills Drive, Atlanta, Georgia 30005, to be sent and delivered by the Post Office Department of the United States; all in violation of Section 1341, Title 18, U.S. Code.

$ 1,000/5 years or both

COUNT EIGHT

1. The Grand Jury realleges all of the allegations contained in subparagraphs (a), (b), (c), (d), (e), (f), (g) and (h) of paragraph numbered 1 and paragraphs numbered 2 and 3 of Count One of this indictment as constituting and describing a scheme and artifice devised and intended to be devised by defendants FRED C. TALLANT, SR. and WILLIAM M. WOMACK, JR. during the period from on or about May 18, 1967 to on or about the date of the filing of this indictment, to defraud and to obtain monies and properties by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be and were false when made, and said defendants wilfully and knowingly made use of the mails in the following manner:

2. On or about the 2nd day of June, 1969, in the Northern District of Georgia and within the jurisdiction of this Court, defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, a certificate for 500 shares of the Class A common stock of Preferred Land Corporation enclosed in an envelope addressed to B. Harold & Marguerite C. Guy, P.O. Box 267, Manchester, Georgia 31818, to be sent and delivered by the Post Office

Department of the United States; all in violation of Section 1341, Title 18, U.S. Code.

$1,000/5 years or both

COUNT NINE

1. The Grand Jury realleges all of the allegations contained in subparagraphs (a), (b), (c), (d), (e), (f), (g) and (h) of paragraph numbered 1 and paragraphs numbered 2 and 3 of Count One of this indictment as constituting and describing a scheme and artifice devised and intended to be devised by defendants FRED C. TALLANT, SR. and WILLIAM M. WOMACK, JR., during the period from on or about May 18, 1967 to on or about the date of the filing of this indictment, to defraud and to obtain monies and properties by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be and were false when made, and said defendants wilfully and knowingly made use of the mails in the following manner:

2. On or about the 2nd day of June, 1969, in the Northern District of Georgia and within the jurisdiction of this Court, defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, a certificate for 100 shares of the Class A common stock of Preferred Land Corporation enclosed in an envelope addressed to Robert M. Long, Warm Springs, Georgia 31830, to be sent and delivered by the Post Office Department of the United States; all in violation of Section 1341, Title 18, U.S. Code.

$1,000/5 years or both

COUNT TEN

1. The Grand Jury realleges all of the allegations contained in subparagraphs (a), (b), (c), (d), (e), (f), (g) and (h) of paragraph numbered 1 and paragraph numbered 2 and 3 of Count One of this indictment as constituting and describing a scheme and artifice devised and intended to be devised by defendants FRED C. TALLANT, SR. and WILLIAM M. WOMACK, JR., during the period from on or about May 18, 1967 to on or about the date of the filing of this indictment, to defraud and to obtain monies and properties by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be and were false when made, and said defendants wilfully and knowingly made use of the mails in the following manner:

2. On or about the 13th day of May, 1969, in the Northern District of Georgia and within the jurisdiction of this Court, defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, a certificate for 100 shares of the Class A common stock of Preferred Land Corporation enclosed in an envelope addressed to Thad F. Blackstock, Jr., Decatur, Georgia, to be sent and delivered by the Post Office Department of the United States; all in violation of Section 1341, Title 18 U.S. Code.

$1,000/5 years or both

COUNT ELEVEN

Prior to the 18th day of May, 1967, and continuing to on or about the date of the filing of this indictment, defendants FRED C. TALLANT, SR. and WILLIAM M. WOMACK, JR., in the Northern District of Georgia, at Atlanta, Georgia, and

at divers other places, did unlawfully, wilfully and knowingly conspire, combine, confederate and agree with each other and with divers other persons whose names to the Grand Jury are unknown, to commit certain offenses against the United States, in violation of Section 371, Title 18, U.S. Code, to wit: To wilfully and knowingly violate Section 77 q(a), Title 15, U.S. Code and Section 1341, Title 18, U.S. Code, and among such violations to commit the divers offenses charged against said defendants in Counts One to Ten inclusive of this indictment, the allegations of which Counts are hereby realleged and incorporated in this Count as fully as if here repreated, and each and all of the acts of said defendants as alleged in the aforesaid Counts One to Ten inclusive are hereby designated as overt acts of said defendants, done in pursuance of and to effect the objects of said conspiracy, and, in addition thereto, said defendants, in pursuance of said conspiracy and to effect the objects thereof, did commit the following overt acts, to wit:

OVERT ACTS

1.

On or about April 4, 1973 defendant WOMACK presented to Securities and Exchange Commission Investigators for their examination certain Preferred Land Corporation stock transfer records which he had caused to be falsified.

2.

On or about May 5, 1969, WOMACK endorsed Check No. 124 drawn on First National Bank of Atlanta, Georgia, Account No. 16-353-88-0 of Shadburn and Company and received $5,000 which was the proceeds of the sales of 2500 shares of the Class A common stock of Preferred Land Cor-

poration paid by PLC investors Donald L. Schwock, Kathryn S. James, Virginia A. Marshal, Elizabeth Rogers, Roudolph B. Spivey, and Eugene C. Sullivan.

3.

On or about May 20, 1969 defendant TALLANT endorsed Check No. 316 drawn on First National Bank of Atlanta, Georgia, Account No. 28-863-38-0 of Charles M. Bryan, III and received $10,000 which was the proceeds of the sale of 5,000 shares of the Class A common stock of Preferred Land Corporation paid by PLC investor Dale R. Brown.

$10,000/5 years or both

COUNT TWELVE

In or about July, 1970, and continuing to on or about the date of the filing of this indictment, defendant WILLIAM M. WOMACK, JR. corruptly influenced, obstructed and impeded and endeavored to influence, obstruct and impede the due and proper administration of the Securities Act of 1933 [15 U.S.C. 77] under which a proceeding was being had before the Securities and Exchange Commission, an agency of the United States, in that defendant WOMACK caused certain stockholder ledger records of Preferred Land Corporation to be falsified and presented them to Securities and Exchange Commission investigators for examination, in violation of Section 1505, Title 18, U.S. Code.

$5,000/5 years or both

A _____ BILL.

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FOREMAN

JOHN W. STOKES, JR.
United States Attorney

DOROTHY T. BEASLEY
Assistant United States Attorney

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